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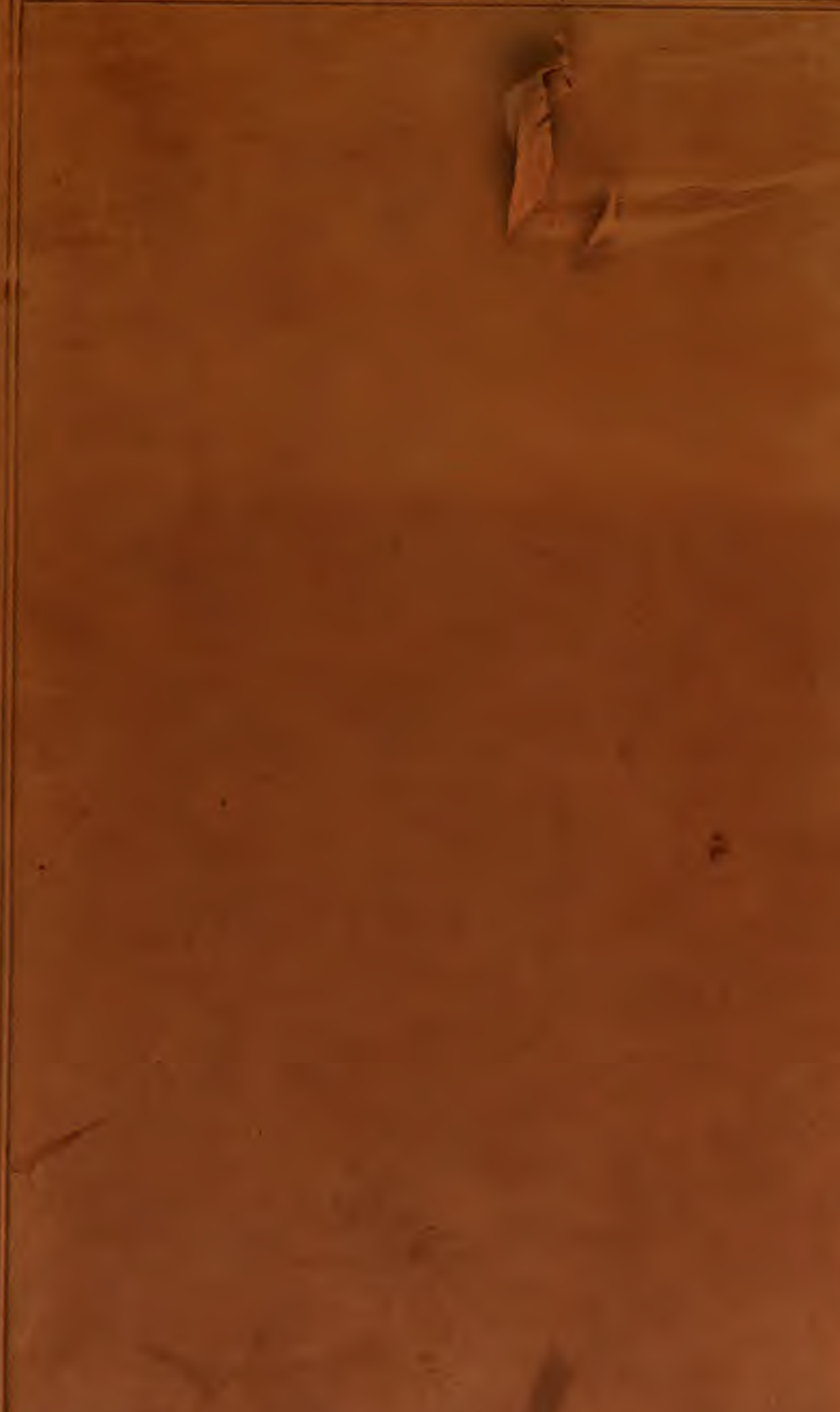
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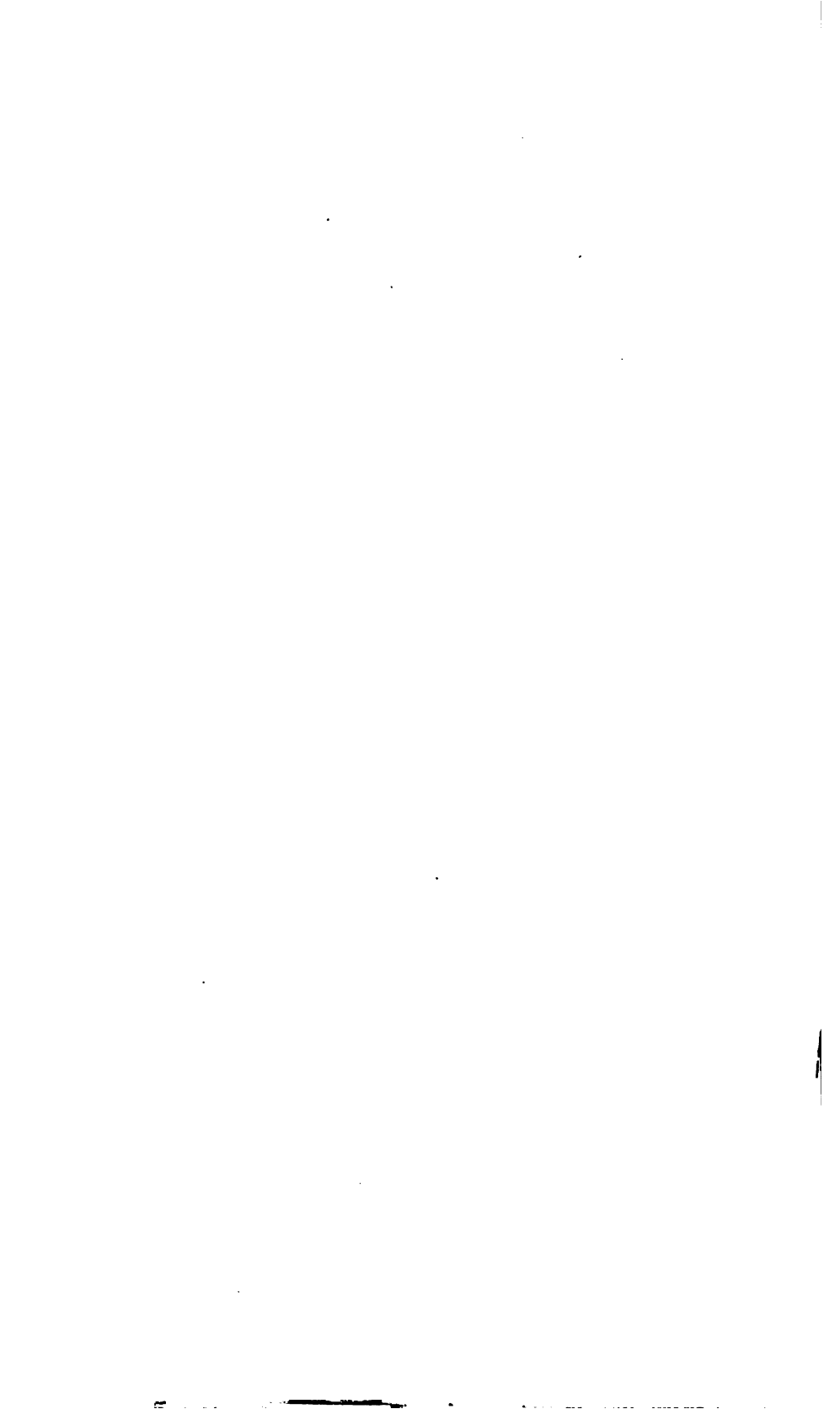
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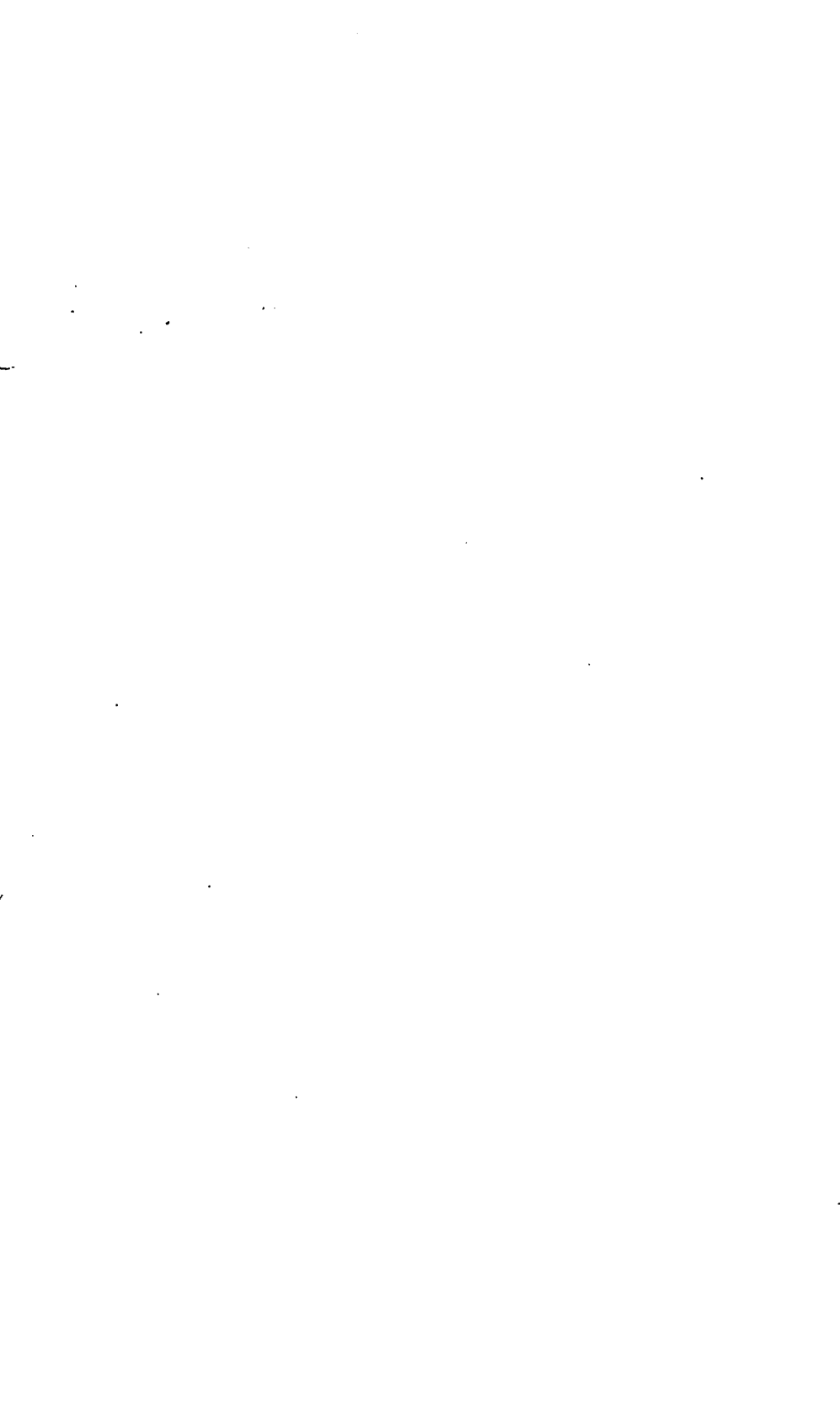
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AMERICAN AND ENGLISH  
**RAILROAD CASES.**

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,  
DECIDED BY THE COURTS OF  
LAST RESORT

IN THE

UNITED STATES, ENGLAND AND CANADA.

EDITED BY

THOMAS J. MICHIE.

VOLUME XVII.

*NEW SERIES.*

THE MICHIE COMPANY, PUBLISHERS,

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# TABLE OF CASES.

## VOLUME XVII.

(NEW SERIES.)

Titles in *italics* indicate cases not reported in full.

<b>Abraham v. Oregon &amp; C. R. Co. <i>et al.</i></b> (Ore.).....	250
<b>Ahnapee &amp; W. Ry. Co., Goldberg <i>et al.</i> v.</b> (Wis.).....	65
<b>American Express Company v. Maynard, Attorney General of the State of Michigan, <i>ex rel.</i> Moore <i>et al.</i></b> (U. S.).....	530
<b>Atchison, T. &amp; S. F. Ry. Co., Dangerfield v.</b> (Kan.).....	650
<b>Atchison, T. &amp; S. F. Ry. Co. v. Young</b> (Ind. Ter.).....	645
<b>Atlantic City R. Co., Baldwin v.</b> (N. J.).....	486
<b>Augusta T. Ry. Co., Austin v.</b> (Ga.).....	711
<b>Austin v. Augusta T. Ry. Co.</b> (Ga.) .....	711
<b>Bader v. Southern Pac. Co.</b> (La.).....	60
<b>Baldwin v. Atlantic City R. Co.</b> (N. J.). .....	486
<b>Baltimore &amp; Ohio Southwestern Railway Company v. Voigt</b> (U. S.).....	111
<b>Baltimore &amp; O. S. W. Ry. Co. v. Hausman</b> (Ky.) .....	237
<b>Beardsley v. New York, L. E. &amp; W. R. Co. <i>et al.</i></b> (N. Y.).....	149
<b>Beecher v. Long Island R. Co.</b> (N. Y.).....	199
<b>Best <i>et al.</i>, International &amp; G. N. R. Co. <i>et al.</i> v.</b> (Tex.).....	153
<b>Bigelow v. Chicago, B. &amp; N. Ry. Co.</b> (Wis.).....	341
<b>Blair, Louisville &amp; N. R. Co. v.</b> (Tenn.).....	159
<b>Blair v. Sioux City &amp; P. Ry. Co. <i>et al.</i></b> (Iowa).....	363
<b>Bond, Central of Georgia Ry. Co. v.</b> (Ga.).....	757
<b>Boston &amp; M. R. R., Lessard v.</b> (N. H.).....	211
<b>Bowcock, Louisville &amp; N. R. Co. v.</b> (Ky.).....	421
<b>Braun v. Northern Pac. Ry. Co.</b> (Minn.).....	139
<b>Brown v. Sioux City &amp; P. Ry. Co. <i>et al.</i></b> (Iowa)...	363
<b>Brown v. State</b> (Ga.).....	247
<b>Burns v. Chicago, M. &amp; St. P. Ry. Co.</b> (Wis.).....	290
<b>Burrows, St. Louis &amp; S. F. R. Co. v.</b> (Kan.).....	678
<b>Carnegie Steel Company, Limited, Southern Railway Company v.</b> (U. S.).....	1
<b>Carrier v. Union Pac. Ry. Co.</b> (Kan.).....	513
<b>Central of Georgia Ry. Co. v. Bond</b> (Ga.).....	757

Central of Georgia Ry. Co., <i>Dixon et al. v.</i> (Ga.).....	380
<i>Central of Georgia Ry. Co. v. Neidlinger</i> (Ga.).....	758
Central R. R. Co. of New Jersey, <i>Glynn v.</i> (Mass.).....	482
Central R. Co. of New Jersey, <i>Haver v.</i> (N. J.).....	490
Central Trust Co. of New York <i>v. Chattanooga, R. &amp; C. R. Co. et al.</i> (C. C. A.).....	548
<i>Chamberlain v. Lake Shore &amp; M. S. Ry. Co.</i> (Mich.).....	241
Charleston & S. Ry. Co., <i>Glover v.</i> (S. Car.).....	102
Chattanooga, R. & C. R. Co. <i>et al.</i> , Central Trust Co. of New York <i>v.</i> (C. C. A.).....	548
Chesapeake & Ohio Railway Company <i>v. Howard et al.</i> (U. S.)..	660
<i>Chesapeake &amp; O. Ry. Co., Huff v.</i> (W. Va.).....	762
Chesapeake & O. Ry. Co. <i>v. King</i> (C. C. A.).....	167
Chicago & A. R. Co. <i>v. Kelly</i> (Ill.).....	52
Chicago, B. & N. Ry. Co., <i>Bigelow v.</i> (Wis.).....	341
Chicago, Milwaukee & St. Paul Railway Company <i>v. Tompkins et al.</i> , Board of Railroad Commissioners of South Dakota, (U. S.)	349
Chicago, M. & St. P. Ry. Co., <i>Burns v.</i> (Wis.).....	290
Chicago, M. & St. P. Ry. Co., <i>Medberry v.</i> (Wis.).....	494
Chicago M. & St. P. Ry. Co., <i>Spencer v.</i> (Wis.).....	163
<i>Chicago, M. &amp; St. P. Ry. Co., Swanson v.</i> (Minn.).....	753
Chicago, R. I. & P. Ry. Co. <i>v. Farwell</i> (Neb.).....	687
Chicago, R. I. & P. Ry. Co. <i>v. Zerneck</i> (Neb.).....	76
<i>Clark et al. v. Russell</i> (C. C. A.).....	68
<i>Clarkson, Felton v.</i> (Tenn.).....	300
Cleveland, Cincinnati, Chicago & St. Louis Railway Co. <i>v. People of the State of Illinois ex rel. Jett</i> (U. S.).....	227
Cleveland, C., C. & St. L. Ry. Co., <i>Narramore v.</i> (C. C. A.).....	502
<i>Cole v. Duluth, S. S. &amp; A. Ry. Co.</i> (Wis.).....	749
Cooper, Louisville & N. R. Co. <i>v.</i> (Ky.).....	304
Corbett, Seattle & M. R. Co. <i>v.</i> (Wash.).....	709
Cromwell, New York, P. & N. R. Co. <i>v.</i> (Va.).....	328
<i>Dangerfield v. Atchison, T. &amp; S. F. Ry. Co.</i> (Kan.).....	650
<i>Dixon et al. v. Central of Georgia Ry. Co.</i> (Ga.).....	380
<i>Dobson v. New Orleans &amp; W. R. Co.</i> (La.).....	404
<i>Duluth, S. S. &amp; A. Ry. Co., Cole v.</i> (Wis.).....	749
Eastern Ry. Co. of Minnesota, <i>Weisel v.</i> (Minn.).....	446
<i>Eastman v. Maine Cent. R. R.</i> (N. H.).....	203
El River R. Co. <i>et al. v. State ex rel. Kistler, Prosecuting Attorney</i> , (Ind.).....	595
<i>Erickson, Trumbull v.</i> (C. C. A.).....	93
<i>Falk et al., Lake Erie &amp; W. R. Co. v.</i> (Ohio).....	751
Farmers' & Drovers' Live-Stock Commission Firm, Louisville & N. R. Co. <i>v.</i> (Ky.).....	284
Farmers' Loan & Trust Company <i>et al.</i> , Lackawanna Iron & Coal Company <i>et al. v.</i> (U. S.).....	561

Farwell, Chicago, R. I. & P. Ry. Co. v. (Neb.).....	687
Felton v. Clarkson (Tenn.).....	300
Felton v. Holbrook (Ky.).....	146
Fluhrer v. Lake Shore & M. S. Ry. Co. (Mich.).....	463
Foreman v. Pennsylvania R. Co. (Pa.).....	246
Gallagher <i>et al.</i> , Hedding v. (N. H.).....	192
Georgia & A. Ry. Co. v. Pound (Ga.).....	398
Glade Creek & R. R. Co., Kay v. (W. Va.).....	695
Glover v. Charleston & S. Ry. Co. (S. Car.).....	102
Glynn v. Central R. R. of New Jersey (Mass.).....	482
Goldberg <i>et al.</i> v. Ahnapee & W. Ry. Co. (Wis.).....	65
Great Northern Ry. Co., O'Neill v. (Minn.).....	415
Griffin, Illinois Cent. R. Co. v. (Ill.).....	767
Harrington v. Louisville & N. R. Co. (Tenn.).....	135
Harris <i>et al.</i> , Receivers of the Philadelphia & Reading Railroad Company, United States v. (U. S.).....	582
Hausman, Baltimore & O. S. W. Ry. Co. v. (Ky.).....	237
Haver v. Central R. Co. of New Jersey (N. J.).....	490
Hedding v. Gallagher <i>et al.</i> (N. H.).....	192
Holbrook, Felton v. (Ky.).....	146
Hollaway v. Sioux City & P. Ry. Co. <i>et al.</i> (Iowa).....	363
Hooper, Southern Ry. Co. v. (Ga.).....	752
Howard <i>et al.</i> , Chesapeake & Ohio Railway Company v. (U. S.).....	660
Huff v. Chesapeake & O. Ry. Co. (W. Va.).....	762
Humble, Texas & P. Ry. Co. v. (C. C. A.).....	83
Hunter, Pullman Palace-Car Co. v. (Ky.).....	204
Hurst, St. Louis & S. F. R. Co. v. (Ark.).....	324
Illinois Cent. R. Co. v. Griffin (Ill.).....	767
International & G. N. R. Co. <i>et al.</i> v. Best <i>et al.</i> (Tex.).....	153
Jones, Owen <i>et al.</i> v. (C. C. A.).....	548
Kansas City, Ft. S. & M. R. Co., Matheson <i>et al.</i> v. (Kan.).....	738
Kay v. Glade Creek & R. R. Co. (W. Va.).....	695
Kelly, Chicago & A. R. Co. v. (Ill.).....	52
Kilpatrick, St. Louis & S. F. R. Co. v. (Ark.).....	212
King, Chesapeake & O. Ry. Co. v. (C. C. A.).....	167
Konold v. Rio Grande W. Ry. Co. (Utah).....	450
Lackawanna Iron & Coal Company <i>et al.</i> v. Farmers' Loan & Trust Company <i>et al.</i> (U. S.).....	561
Lake Erie & W. R. Co. v. Falk <i>et al.</i> (Ohio).....	751
Lake Shore & M. S. Ry. Co., Chamberlain v. (Mich.).....	241
Lake Shore & M. S. Ry. Co., Fluhrer v. (Mich.).....	463
Lessard v. Boston & M. R. R. (N. H.).....	211
Long Island R. Co., Beecher v. (N. Y.).....	199
Louisville & N. R. Co. v. Blair (Tenn.).....	159
Louisville & N. R. Co. v. Bowcock (Ky.).....	421
Louisville & N. R. Co. v. Cooper (Ky.).....	304



Louisville & N. R. Co. v. Farmers' & Drovers' Live-Stock Commission Firm (Ky.).....	284
Louisville & N. R. Co., Harrington v. (Tenn.).....	135
Louisville & N. R. Co. v. McEwan (Ky.)... ..	208
<i>Louisville &amp; N. R. Co. v. Penrod's Adm'r</i> (Ky.).....	759
Louisville & N. R. Co. v. Ross (Ky.).....	432
Louisville & N. R. Co. v. Scott's Adm'r (Ky.).....	261
Louisville & N. R. Co., Warfield v. (Tenn.).....	135
Lynch, Treasurer of Salt Lake County, Union Refrigerator Transit Company v. (U. S.).....	588
Macoy v. Sioux City & P. Ry. Co. <i>et al.</i> (Iowa).....	363
Maine Cent. R. R., Eastman v. (N. H.).....	203
Matheson <i>et al.</i> v. Kansas City, Ft. S. & M. R. Co. (Kan.)..	738
Maynard, Attorney General of the State of Michigan, <i>ex rel.</i> Moore <i>et al.</i> , American Express Company v. (U. S.).....	530
McAnally v. Pennsylvania R. Co. (Pa.).....	741
McEwan, Louisville & N. R. Co. v. (Ky.).....	208
Medberry v. Chicago, M. & St. P. Ry. Co. (Wis.).....	494
Merrill, Missouri, K. & T. Ry. Co. <i>et al.</i> v. (Kan.).....	470
Millsaps <i>et al.</i> , Yazoo & M. V. R. Co. v. (Miss.).....	269
Minneapolis & St. L. R. Co. <i>et al.</i> , Railroad & Warehouse Commission v. (Minn.).....	630
Minneapolis & St. L. R. Co., Wagen v. (Minn.).....	438
Missouri, K. & T. Ry. Co. <i>et al.</i> v. Merrill (Kan.).....	470
Missouri, K. & T. Ry. Co. v. Truskett (I. T.).....	273
Missouri Pac. Ry. Co., Paddock v. (Mo.).....	310
<i>Mooers v. Northern Pac. Ry. Co.</i> (Minn.).....	753
Narramore v. Cleveland, C., C. & St. L. Ry. Co. (C. C. A.).....	502
<i>Neidlinger, Central of Georgia Ry. Co. v.</i> (Ga.).....	758
New Orleans & W. R. Co., Dobson v. (La.).....	404
New York Cent. & H. R. R. Co., Trimble v. (N. Y.).....	176
New York, L. E. & W. R. Co. <i>et al.</i> , Beardsley v. (N. Y.).....	149
New York, P. & N. R. Co. v. Cromwell (Va.).....	328
Norfolk & W. Ry. Co., Smith v. (W. Va.)..	108
Northern Pac. Ry. Co., Braun v. (Minn.).....	139
<i>Northern Pac. Ry. Co., Mooers v.</i> (Minn.).....	753
O'Neill v. Great Northern Ry. Co. (Minn.).....	415
Oregon & C. R. Co. <i>et al.</i> , Abraham v. (Ore.).....	250
Oskamp <i>et al.</i> v. Southern Exp. Co. (Ohio).....	334
Owen <i>et al.</i> v. Jones (C. C. A.).....	548
Paddock v. Missouri Pac. Ry. Co. (Mo.).....	310
Pennsylvania R. Co., McAnally v. (Pa.).....	741
Pennsylvania R. Co., Foreman v. (Pa.).....	246
<i>Penrod's Adm'r, Louisville &amp; N. R. Co. v.</i> (Ky.).....	759
People of the State of Illinois <i>ex rel.</i> Jett, Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. (U. S.).....	227

Pound, Georgia & A. Ry. Co. v. (Ga.)	398
Pullman Palace-Car Co. v. Hunter (Ky.)	204
Railroad & Warehouse Commission v. Minneapolis & St. L. R. Co. et al. (Minn.)	630
Rio Grande W. Ry. Co., Konold v. (Utah)	450
Ross, Louisville & N. R. Co. v. (Ky.)	432
Russell, Clark et al. v. (C. C. A.)	68
Rutherford v. Southern Ry. Co. (S. Car.)	520
Scott's Adm'r, Louisville & N. R. Co. v. (Ky.)	261
Scott, Sheriff et al. (Hammett et al., Interveners), Vicksburg, S. & P. R. Co. v. (La.)	745
Seattle & M. R. Co. v. Corbett (Wash.)	709
Sims v. Western & A. R. Co. (Ga.)	756
Sims, Western & A. R. Co. v. (Ga.)	756
Sioux City & P. Ry. Co. et al., Blair v. (Iowa)	363
Sioux City & P. Ry. Co. et al., Brown v. (Iowa)	363
Sioux City & P. Ry. Co. et al., Hollaway v. (Iowa)	363
Sioux City & P. Ry. Co. et al., Macoy v. (Iowa)	363
Smith v. Norfolk & W. Ry. Co. (W. Va.)	108
Southern Exp. Co., Oskamp et al. v. (Ohio)	334
Southern Pac. Co., Bader v. (La.)	60
Southern Railway Company v. Carnegie Steel Company, Limited, (U. S.)	1
Southern Ry. Co. v. Hooper (Ga.)	752
Southern Ry. Co., Rutherford v. (S. Car.)	520
Southern Ry. Co., State v. (N. Car.)	45
Spencer v. Chicago, M. & St. P. Ry. Co. (Wis.)	163
State, Brown v. (Ga.)	247
State ex rel. Kistler, Prosecuting Attorney, Eel River R. Co. et al. v. (Ind.)	595
State ex rel. Railroad & Warehouse Commission v. Minneapolis & St. L. R. Co. et al. (Minn.)	630
State v. Southern Ry. Co. (N. Car.)	45
St. Louis & S. F. R. Co. v. Burrows (Kan.)	678
St. Louis & S. F. R. Co. v. Hurst (Ark.)	324
St. Louis & S. F. R. Co. v. Kilpatrick (Ark.)	212
Swanson v. Chicago, M. & St. P. Ry. Co. (Minn.)	753
Texas & P. Ry. Co. v. Humble (C. C. A.)	83
Tompkins et al., Board of Railroad Commissioners of South Dakota, Chicago, Milwaukee & St. Paul Railway Company v. (U. S.)	349
Trimble v. New York Cent. & H. R. R. Co. (N. Y.)	176
Trumbull v. Erickson (C. C. A.)	93
Truskett, Missouri, K. & T. Ry. Co. v. (I. T.)	273
Union Pac. Ry. Co., Carrier v. (Kan.)	513

Union Refrigerator Transit Company <i>v.</i> Lynch, Treasurer of Salt Lake County (U. S.).....	588
United States <i>v.</i> Harris <i>et al.</i> , Receivers of the Philadelphia & Reading Railroad Company, (U. S.).....	582
<i>Vicksburg, S. &amp; P. R. Co. v. Scott, Sheriff et al. (Hammett et al., Interveners) (La.)</i> .....	745
Voigt, Baltimore & Ohio Southwestern Railway Company <i>v.</i> (U. S.).....	111
Wagen <i>v.</i> Minneapolis & St. L. R. Co. (Minn.).....	438
Warfield <i>v.</i> Louisville & N. R. Co. (Tenn.).....	135
Weisel <i>v.</i> Eastern Ry. Co. of Minnesota (Minn.).....	446
<i>Western &amp; A. R. Co. v. Sims (Ga.)</i> .....	756
<i>Western &amp; A. R. Co., Sims v. (Ga.)</i> .....	756
Yazoo & M. V. R. Co. <i>v.</i> Millsaps <i>et al.</i> (Miss.).....	269
Young, Atchison, T. & S. F. Ry. Co. <i>v.</i> (Ind. Ter.).....	645
Zernecke, Chicago, R. I. & P. Ry. Co. <i>v.</i> (Neb.).....	76

THE  
AMERICAN AND ENGLISH  
RAILROAD CASES

NEW SERIES.

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VOLUME XVII.

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SOUTHERN RAILWAY COMPANY

v.

CARNEGIE STEEL COMPANY, LIMITED.

*(Supreme Court of the United States, Jan. 29, 1900.)*

**Foreclosure Sales—Reserving Rights of Claimants.**—Where the rights of a claimant asserting that his debt is a prior claim upon the property and income of a railroad in the hands of a receiver to the mortgage debt are reserved in the decree of sale and in the order confirming the sale, such rights are not affected by the sale and transfer of the property to the purchaser.

**Preferential Claims upon Current Income—Material Furnished Prior to Receivership.**—A debt for rails needed to keep the railroad in a safe condition for use, incurred shortly prior to the receivership, is a claim upon current income prior to mortgage debts,—as much so as if contracted by the receiver under order of court. Before, however, such a claim is accorded a preference over the mortgage debts in the distribution of the net earnings in the hands of a receiver of the railroad, it should reasonably appear from all the circumstances, including the amount involved and the terms of payment, that the debt was one fairly to be regarded as a part of the operating expenses of the railroad incurred in the ordinary course of business and to be met out of current receipts.

**Same—Same—Effect of Taking Notes.**—The equities of such a creditor furnishing that which protected and preserved the mortgage security and materially increased its value are not affected by the fact that the original debt was evidenced by the notes of the railroad

## Southern Railway Co. v. Carnegie Steel Co., Limited

company, taken for its convenience and renewed for its accommodation.

**Same—Same—Effect of Using Rails on Leased Roads.**—The rights of such a creditor to priority of payment out of current income are none the less because the railroad company chose, after obtaining the rails, to use a part of them on roads under its control and in its possession, and whose preservation in proper condition was vital to the successful operation of its own road.

**Same—Same—Six Month's Rule Not Absolute.\***—A claim accruing back of the six months immediately preceding the appointment of a receiver may, under the circumstances of particular cases, be accorded the same priority in the distribution of earnings of the railroad that belongs to like claims arising within that period; no absolute rule on the subject having been prescribed by statute or by judicial decisions.

**Same—Diversion of Income—Rights of Unsecured Creditors.**—Where the current earnings of a railroad which should have been applied in meeting current expenses were diverted for the benefit of mortgage creditors, claims for such current expenses are entitled to priority of payment out of the proceeds of the foreclosure sale of the railroad over the mortgage debts.

WRIT of *certiorari* to the United States circuit court of appeals, fourth circuit. *Affirmed.*

Statement of the case by MR. JUSTICE HARLAN:

This case is here upon a writ of *certiorari* for the review of a final decree of the United States circuit court of appeals for the fourth circuit allowing certain claims of the Carnegie Steel Company, Limited, as preferential debts chargeable upon current receipts arising from the operation of certain railroad properties in the hands of receivers.

On the 15th day of June, 1892, William P. Clyde, John C. Maben, and William H. Goadby, citizens of New York, suing for themselves and other creditors and stockholders of the Richmond & Danville Railroad Company and of other defendant corporations, exhibited in the circuit court of the United States for the eastern district of Virginia a bill of complaint against the Richmond & Danville Railroad Company and the Richmond & West Point Terminal Railway & Ware-

\*See *International Trust Co. v. T. B. Townsend Brick & C. Co.* (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 310, and *note*, p. 336.

Southern Railway Co. v. Carnegie Steel Co., Limited

house Company, Virginia corporations. The bill made the following case :

The Richmond & Danville Railroad Company (hereafter called the Danville Company), in addition to its own line extending from Richmond to Danville, with a 12-mile branch, being 152 miles of road, through the purchase or the acquisition of stock, or by written lease or operating contracts, obtained the possession and control of more than twenty other railways built under the respective charters of and owned by the corporations named in the bill. It also owned the entire capital stock of the Baltimore, Chesapeake, & Richmond Steamboat Company, and through it operated a line of steamers between Richmond, West Point, and Baltimore. Its authorized and outstanding capital stock was \$5,000,000, the larger part being owned by its codefendant company.

The lines of railway comprising this system, known as the Danville system, were in Virginia, North Carolina, South Carolina, Georgia, Alabama, and Mississippi, and reached many of the most important trade centers of those states.

For more than five years prior to the institution of that suit the Danville Company had held in possession and substantial control all the railways of the other companies in connection with its own road as a single system. Over a large portion of the mileage the engines and cars in traffic service were used without any fixed apportionment thereof to any specific portion of the system, and the income derived from the operations of the parent and auxiliary, leased, and operated liens was received and distributed through a common treasury with no separation of the earnings and expenses of the several properties, except by entries in books of account apportioning the gross income and expenses on some approximate but arbitrary basis of division as between the different lines over which the traffic yielding the revenue had passed.

The total mileage of the auxiliary portion of the Danville

## Southern Railway Co. v. Carnegie Steel Co., Limited

railroad, added to its own mileage, aggregated 3,320 miles, exclusive of its steamer service.

The aggregate outstanding capital stock of the lines constituting the system, together with the stock of the steamboat company, amounted to \$43,482,950, of which \$10,707,354 was neither owned nor controlled by the defendant companies.

Through the ownership of all or a majority of the stock thereof, some of the roads were operated by the Danville Company as proprietary lines. Others were operated upon the basis of a fixed rental or payment of net earnings, or a guarantee of interest on bonds or dividends of stock, or both.

In consequence of the absorption of such roads in its system by lease or contract, the bonded debts and rental obligations which the Danville Company had assumed and became liable for amounted to \$71,128,126. Its own direct bonded debt was \$16,136,000, making the total bonded and rental debt of the Danville system \$87,314,126.

The bonded debt resting on the Danville road proper and equipments was in five separate issues of securities; that resting on its auxiliary and operative lines was embraced in fifty-nine different classes of securities issued by the several companies, secured by separate mortgages or deeds of trust covering different sections of the controlled roads or their equipment, capable of separate default or foreclosure, besides five stock guaranties, representing certain of its rental obligations, also secured by provisions for reentry on default.

The Danville Company also had outstanding car trust obligations of its own and leased lines amounting to \$1,542,824, and a floating debt of over \$5,000,000; also an emergency loan of \$600,000, advanced by those interested in the property to prevent default on April 1, 1892.

Besides all such outstanding fixed liabilities on account of its own road and controlled lines, the directors of the Danville Company had pledged its credit and subjected it to other heavy liabilities, to enable its codefendant, the Richmond & West Point Terminal Railway & Warehouse Company (to

Southern Railway Co. v. Carnegie Steel Co., Limited

be hereafter referred to as the Terminal Company) or certain of its controlled companies, to acquire the stock control of other lines of railroads not directly connected with or operated by the Danville Company and in which it had no interest whatever. Its board of directors had issued \$6,000,000 of bonds of the Danville Company, executed jointly and severally with the East Tennessee, Virginia, & Georgia Company, and guaranteed by the Terminal Company "Cincinnati Extension Bonds," which were secured by a trust pledge of preference and ordinary shares of the Alabama & Great Southern Railway Company, Limited. Those bonds had been sold in open market, and apparently constituted an outstanding liability of the Danville Company, but for which it received no valuable consideration whatever. It had executed the same as mere accommodation paper and as a partnership adventure, and was only protected against loss by the above pledge of corporate stock of uncertain value, because it was subject to heavy prior mortgage debts, and the line of road of the particular corporation issuing such stock was a central link in the system of the East Tennessee Railway system over which the Danville Company had no control whatever.

By reason of the absolute stock control which the Terminal Company had over the Danville Company it compelled the latter company about June 1, 1891, to become the assignee and guarantor of a written lease executed by the Central Railroad & Banking Company of Georgia, of all its system of railroads and steamer lines for a long term of years to the Georgia Pacific Railway Company, whereby the Danville Company became bound to operate the Central System and to assume and pay all the interest on the bonded debts and all the rental obligations of the Central Railroad & Banking Company; and the Danville Company was compelled to execute and deliver a bond of \$1,000,000 to faithfully perform all the covenants in such lease. The result of the operation of the Central-Georgia system of roads had been a constant and heavy loss to the Danville Company.



## Southern Railway Co. v. Carnegie Steel Co., Limited

The bill next set out the relations between the Danville Company and the Terminal Company, and also describes what is known as the Tennessee system, having 2,318 miles in length of proprietary, leased, and operated roads.

It then stated that the five several issues of bonds of the Danville Company were secured by mortgages to divers trustees, and constituted liens of varying rank upon some portion of its road, franchises, and equipment; that the bonds issued by the Danville and Terminal Companies, as well as a large majority of the several issues of bonds resting on the different separately mortgaged sections of the Danville system, were owned by a large and constantly shifting number of persons and corporations, who were scattered in many different states and countries and had no organization or registration; that what was known as the emergency loan, for which the income of the Danville system was pledged, was advanced in equal sums by a considerable number of persons, many of whom preferred not to have their names or advances disclosed; that the plaintiff, Maben, was a registered stockholder of the Danville Company; that the plaintiffs were owners of a large amount of the common preferred stock of the Terminal Company and of its 6 and 5 per cent bonds, of the Danville Company's debenture and 5 per cent bonds, and of different classes of bonds resting on parts of the Danville system, and some of them were creditors of the Danville Company on account of advances made to the emergency loan, and entitled to the security given therefor; that while nominally distinct corporations, the actual transactions and financial arrangements between the Terminal Company, conducting no active business as a security company, with no assets except stocks and bonds (but holding nearly the entire capital stock of the Danville Company) and the Danville Company, as a corporation operating a large system of railways, separately organized and mortgaged, had resulted in serious complications; that such community of heavy and extra hazardous liability and hypothecation indissolubly connected the financial operations of the Danville and Ter-

## Southern Railway Co. v. Carnegie Steel Co., Limited

terminal Companies, so that the unrelieved embarrassment of either company would necessarily force the insolvency of the other, "and produce a disruption of the system of roads;" that the then financial condition of the two defendant corporations was alarming to the holders of their stocks and bonds; that in the latter part of 1891 the large and increasing floating debts of the several properties in which the Terminal Company was interested and the heavy losses incurred in the operations of some of the roads created much uneasiness among the stockholders and creditors; that by reason of such condition of things the management had invited prominent financiers to investigate the several systems and aid in perfecting the best plan for permanently adjusting the affairs of the companies in question and secure them the credit necessary for their successful operation; that two movements to that end had failed, when about the last of May, 1892, "a large number of security holders joined in a request to an eminent banking firm of New York city that it should investigate the property and its financial condition, and undertake to rescue it from the bankruptcy, shrinkage in value, and disruption with which the system was threatened;" that such bankers consented to cause an examination to be made, and the plaintiffs were advised that the same was in progress, but that no conclusion had been reached or report made, and necessarily the creditors and security holders were so numerous, scattered, and unknown, and the classes of liens so varied in character and value, that to perfect any satisfactory plan to reorganize the system and secure the necessary creditors' assent would require considerable time; and that in the meantime the financial embarrassments continued to be urgent and threatening, and the possible consequence thereof might "result in the disruption of the system, and the depreciation of millions of dollars in the value of the securities."

The bill further alleged that the enormous floating debt of the Danville Company was wholly beyond its financial ability to carry out of its ordinary revenues, over \$4,500,000 of such debt standing in demand loans subject to summary

Southern Railway Co. *v.* Carnegie Steel Co., Limited

enforcement; that by reason of the depreciation in the market value of its securities, and the failure of the several efforts to reorganize the property, its credit had been much impaired; it was not able to pay its obligations as they matured, but had been forced to ask renewals; it had no available collaterals to enable it to negotiate such a loan as was necessary to adequately protect it against open default; it had been forced to postpone payment of usual operating expense vouchers for supplies, and was allowing heavy arrears of such debts to accrue; many creditors had brought suits and attached cars and funds forwarded to pay employees; besides its floating debt, mortgage coupons on seventeen sectional mortgages, aggregating \$989,000, would fall due on July 1, 1892; it had no available money or assets wherewith to pay the debts which would soon mature and no reasonable hope of financial assistance from any quarter to enable it to do so; its directors had had no meeting for over two months, and had practically abdicated their trust and power of management and confessed their utter inability to devise means to divert the insolvency and disruption of the system in their charge.

Plaintiffs charged that the corporation was insolvent and this vast trust property was substantially derelict; that the unity of the property, as held and operated as an important trunk line, constituted one of the most important ingredients of its value, and that to permit its severance would result in a ruinous sacrifice to every interest in the property; that the owned and operated lines of road lie in six states, and were subject to the jurisdiction of the courts in each of the many counties in which the property was situate; that unless the court, in view of the impending and inevitable defaults as aforesaid, would deal with the property as a single trust fund, and take it into judicial custody for the protection of every interest therein, individual creditors, immediately upon default, would assert their remedies in different courts in the several states; that a race of diligence would result, and judgments and priorities attempted; that levies and attach-

Southern Railway Co. v. Carnegie Steel Co., Limited

ments would be laid upon the engines and cars of the company, and upon the fuel, material, and supplies indispensable to the operations of the road, and which would greatly interfere and ultimately prevent the company from properly discharging its duties as a public carrier and seriously diminish the earnings of the road; that lessors of the roads now owned would enforce the reentry covenants of their leases; that the continued default of the mortgaged debts would produce the immediate maturity of the bonds; and that "a vast and unnecessary multiplicity of suits will result, and a most important and valuable trust property will be dismembered by the clashing decrees of the many courts exercising jurisdiction at the suit of separate creditors, which might be shielded and preserved as a valuable single trust property by adequate judicial protection until such time as a satisfactory financial reorganization could be perfected."

The plaintiffs also averred "that the Central Trust Company is not only the trust depository in the said pledge of income, but is the trustee in over twelve trust deeds executed by the Danville Company and divers roads in its system, and also trustee for the preferred stockholders and 6 per cent and 5 per cent trust deeds of the Terminal Company. That the trusts and duties in said different deeds as to property, equipment, and income are variant, and in some respect antagonistic. In case of default and judicial enforcement, their reciprocal rights will have to be construed and decreed by the court, and such common trustee cannot properly represent such variant trusts; and the bondholders have the equity to apply in their own names to protect the trust estate."

The relief asked was—

That the court would decree that the plaintiffs as holders of aliquot portions of the emergency loan to the Danville Company, guaranteed by the Terminal Company, had a fixed and specific lien upon all and singular the income, tolls, and revenues of the Danville Company and its leased, operated, and controlled railroads, and each of them, and that the

## Southern Railway Co. v. Carnegie Steel Co., Limited

condition of such pledge of income had been broken, entitling the holders of such indebtedness to enforcement thereof;

That the court would also administer the trust fund in which the plaintiffs were interested, constituting the entire railroad and assets of the defendant corporations, and would for that purpose marshal all their assets and ascertain the respective liens and priorities existing upon every part of such system of railways, the amount due upon mortgages and other liens, and enforce and decree the rights, liens, and equities of each and all of the stockholders and creditors of the Danville and Terminal Companies as the same were finally ascertained and decreed, in and to not only those lines of railroads, appurtenances, and equipments, but also to and upon every portion of the assets and property of each of those corporations; and—

That for the purpose of enforcing a lien and equity upon the income of the railroad system aforesaid, to which the holders of the emergency loan were by contract entitled, "as well as to preserve the unity of said system," as it had been for years maintained and operated, and preventing the disruption thereof by separate executions, attachments, or sequestrations, the occurrence of which would be inevitable in view of the defaults in interest payments which would presently occur, the court would forthwith appoint one or more receivers of the entire system of railroads and steamers held and operated by the Danville Company, together with all equipment, material, machinery, supplies, moneys, accounts, choses in action, and assets of every description and wherever situated, together with all lease hold rights and contracts, with authority to manage and operate the same as the officers of and under the direction of the court, and that all the officers, managers, superintendents, and employees of the Danville Company be required to forthwith deliver up the possession of all and singular each and every part of the property, over which the receivers were thus appointed, wherever situate, and also all books of accounts, offices, vouchers, and

*Southern Railway Co. v. Carnegie Steel Co., Limited*

papers in any way relating to the business or operation of such system of railways and steamers, and for injunctions restraining each and every of the officers, directors, managers, superintendents, agents, and employees of the Danville Company from interfering in any way whatever with the possession and control of the receivers over any part of the property.

Upon hearing and considering the bill, with the exhibits and answer in support thereof, and on motion of the complainants, Frederic W. Huidekoper and Reuben Foster were appointed by the court receivers of the property and assets of the Danville Company, namely, the system of railways then in the possession of and owned and controlled by that corporation, situated in the District of Columbia and in the states of Virginia, North and South Carolina, Georgia, Alabama, and Mississippi, together with all the equipments, shops, appurtenances of every kind, machinery, material, and supplies owned, held, or in the possession and use of such corporation, wherever situate, including all tracks, terminal facilities, real estate, warehouses, offices, stations, and all other buildings of every kind, owned, held, or possessed by the Danville Company, together with all steamers, wharves, and other properties held in connection therewith, and all moneys, choses in action, credit, bonds, stocks, leasehold interests, or operating contracts, and other assets of every kind, and all other property, real, personal, and mixed, owned, held, or possessed by that company.

It was further provided in the order of the court that the receivers "shall from time to time, out of the funds coming into their hands from the operation of the property, pay the expense of operating the same and executing their trusts, and all taxes and assessments upon the said property or any part thereof, and also pay and discharge all such traffic and car mileage balances as may be due to connecting and other railways, and all such loss and damage claims arising from the previous operation of said property as, in their judgment, on examination, are proper to be paid as expenses of

## Southern Railway Co. v. Carnegie Steel Co., Limited

operation; and shall also, out of the moneys coming into their hands, pay and discharge all the current unpaid pay rolls and vouchers and supply accounts incurred in the operations of said railroad system, at any time within six months prior hereto."

The receivers, who are referred to in the record as the insolvency receivers, entered into full and exclusive possession on the 16th day of June, 1892.

On that and the succeeding day auxiliary suits were instituted by the plaintiffs against the Danville Company in the circuit courts of the United States for the western district of North Carolina, the district of South Carolina, the northern district of Georgia, the northern district of Alabama and the northern district of Mississippi, and orders were duly entered of record by each of those courts confirming the original appointment of receivers and recognizing the circuit court of the eastern district of Virginia as having primary jurisdiction over all the railroad system and property of the Danville Company wherever situated.

On the 28th day of June, 1892, the plaintiffs filed a petition in the cause, stating that the Central Trust Company of New York was trustee in five mortgages executed by the Danville Company, resting upon its property, and of the following dates and amounts: October 5, 1874, \$5,997,000; February 1, 1882, \$3,368,000; October 22, 1886, \$4,498,000; September 3, 1889, \$1,390,000; May 1, 1891, \$883,000. The petitioners prayed that the receivers be authorized to execute and sell receivers' certificates to an amount not exceeding \$1,000,000, which should be a first lien on the Richmond & Danville Railroad, its property, leasehold interests, contracts, and income, "and out of the proceeds, as a special fund, to pay and discharge all outstanding indebtedness of the Danville Company incurred for material and supplies in the operation of the roads in the receivers' hands, which were purchased within six months prior to June 15, 1892, as the said indebtedness shall be ascertained and reported on by special masters to be appointed for such purpose; and also,

Southern Railway Co. v. Carnegie Steel Co., Limited

that out of the funds coming into their hands from the operation of the roads which could be safely used without prejudice to their own current liabilities for operating expenses, the receivers be authorized to pay the instalments of rent and coupons of mortgage bonds resting "upon the several parts of the system, so as to protect and preserve the present unity of the system of roads in their charge." The petition concluded: "The Central Trust Company is the trustee in each and all of the trust deeds and mortgages, and it is made a party hereto, so that it can appear to the application and be heard upon the question of using receivers' certificates and authorizing the payment of mortgage, interest, and rental obligations out of the current net income of the receivership."

Of the application for an order in accordance with the petition, the defendants and the Central Trust Company had notice. The court by order authorized the borrowing of \$1,000,000 receivers' certificates to be used for the purposes indicated in the petition. The Trust Company was represented at the hearing of the application; and, so far as the record discloses, made no objection to the order.

On the 13th day of July, 1892, the Central Trust Company presented its petition and prayed that it be allowed to intervene in the suit brought by Clyde and others for the protection of the holders of the 6 per cent bonds of the Danville Company and of the subscribers to the emergency loan made prior to April 1, 1892, and in respect of which that company was the trust depositary of the income of the Danville system pledged to secure such loan; and by order entered August 16, 1892, leave was given for that company to intervene in the cause, "on the condition that it hereby submits to the several orders heretofore entered herein." On the latter day that company presented its petition, asking that Huidekoper and Foster be appointed as permanent receivers of the Danville Company, if the court should determine to continue its judicial possession of the system. An order to that effect was accordingly made. In presenting the above petition the Central Trust Company appeared



## Southern Railway Co. v. Carnegie Steel Co., Limited

not only as trustee of the Richmond & Danville Railroad Company and the consolidated gold mortgage, to be presently referred to, but as trustee representing other mortgages and railroads, including the Virginia Midland Railroad, the Georgia Pacific Railway, and the North Eastern Railroad of Georgia.

On the 19th day of December, 1892, an intervening petition was presented by parties representing the underlying bondholders interested in any litigation or proceedings for the foreclosure of any of the mortgage or trust deeds of the Danville Company or any of the companies forming a part of the Danville system, and they were permitted to become parties complainant in the Clyde suit and to file such petitions and take such proceedings as they deemed necessary or requisite for the protection of the interests they represented.

In the suit instituted by Clyde and others, the Carnegie Steel Company, Limited, filed with the Master Commissioner, October 14, 1892, its claims arising out of certain contracts made between that company and the Danville Railroad Company in 1891 for steel rails delivered to the latter between July 25, 1891, and October 10, 1891. The facts relating to those contracts will be hereafter stated.

On the 13th day of April, 1894, the Central Trust Company of New York instituted a separate suit against the Richmond & Danville Railroad Company for the foreclosure of what is known as the consolidated gold mortgage. Upon the filing of that petition, and on the motion of the Trust Company, an order was entered appointing Huidekoper, Foster, and Spencer receivers of the court of all and singular the railroads, property, assets, credits, and effects of the Richmond & Danville Railroad Company, "the same being the system of railways owned, operated, or controlled by the said corporation, situate in the District of Columbia and in the states of Virginia, North Carolina, South Carolina, Georgia, Alabama, and Mississippi, together with all the equipment, shops," etc., "and other assets of every kind, and all other property, real, personal, and mixed, held or

*Southern Railway Co. v. Carnegie Steel Co., Limited*

possessed by the said railroad company, the above mentioned property being now in the possession of said Frederic W. Huidekoper and Reuben Foster, receivers duly appointed by this court in a certain suit brought in this court and now pending therein, wherein William P. Clyde and others are plaintiffs and the Richmond & Danville Railroad Company and others are defendants." These receivers are described in the record as the foreclosure receivers.

The order last named contained this clause :

"Nothing in this order contained shall be construed to vacate any of the orders heretofore entered in the case of William P. Clyde and others; but the court reserves full power to act upon the masters' reports filed in the said cause, and in said cause to adjudge and decree upon the rights of creditors ascertaining [asserting] a claim against the property of the said railroad company or income thereof, in preference to the mortgage debt thereof, by orders to be entered in the said suit of William P. Clyde and others, upon notice to parties, with like effect upon the mortgage property and income as if such orders were entered in this cause."

The Carnegie Company was permitted to intervene in the suit brought by the Central Trust Company, alleging in its petition that the rails sold and delivered by it to the Danville Company were used upon its roadbed for the purpose of maintaining the same in condition to conduct its traffic thereon, and were necessary for that purpose. The claimants referred to the fact that they had previously filed their claim in the Clyde suit, "which claim is now pending in said cause before the masters, the demand of your petitioner that the same shall be allowed as a claim entitled to equitable priority of payment over the mortgage debt of the said defendant not having been heard or considered by said masters."

On the 17th day of February, 1894, the suit instituted by the Central Trust Company of New York and the one brought by Clyde and others were consolidated under the name of "The Central Trust Company of New York and

## Southern Railway Co. v. Carnegie Steel Co., Limited

enforcement; that by reason of the depreciation in the market value of its securities, and the failure of the several efforts to reorganize the property, its credit had been much impaired; it was not able to pay its obligations as they matured, but had been forced to ask renewals; it had no available collaterals to enable it to negotiate such a loan as was necessary to adequately protect it against open default; it had been forced to postpone payment of usual operating expense vouchers for supplies, and was allowing heavy arrears of such debts to accrue; many creditors had brought suits and attached cars and funds forwarded to pay employees; besides its floating debt, mortgage coupons on seventeen sectional mortgages, aggregating \$989,000, would fall due on July 1, 1892; it had no available money or assets wherewith to pay the debts which would soon mature and no reasonable hope of financial assistance from any quarter to enable it to do so; its directors had had no meeting for over two months, and had practically abdicated their trust and power of management and confessed their utter inability to devise means to divert the insolvency and disruption of the system in their charge.

Plaintiffs charged that the corporation was insolvent and this vast trust property was substantially derelict; that the unity of the property, as held and operated as an important trunk line, constituted one of the most important ingredients of its value, and that to permit its severance would result in a ruinous sacrifice to every interest in the property; that the owned and operated lines of road lie in six states, and were subject to the jurisdiction of the courts in each of the many counties in which the property was situate; that unless the court, in view of the impending and inevitable defaults as aforesaid, would deal with the property as a single trust fund, and take it into judicial custody for the protection of every interest therein, individual creditors, immediately upon default, would assert their remedies in different courts in the several states; that a race of diligence would result, and judgments and priorities attempted; that levies and attach-

*Southern Railway Co. v. Carnegie Steel Co., Limited*

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The plaintiffs also averred "that the Central Trust Company is not only the trust depository in the said pledge of income, but is the trustee in over twelve trust deeds executed by the Danville Company and divers roads in its system, and also trustee for the preferred stockholders and 6 per cent and 5 per cent trust deeds of the Terminal Company. That the trusts and duties in said different deeds as to property, equipment, and income are variant, and in some respect antagonistic. In case of default and judicial enforcement, their reciprocal rights will have to be construed and decreed by the court, and such common trustee cannot properly represent such variant trusts; and the bondholders have the equity to apply in their own names to protect the trust estate."

The relief asked was—

That the court would decree that the plaintiffs as holders of aliquot portions of the emergency loan to the Danville Company, guaranteed by the Terminal Company, had a fixed and specific lien upon all and singular the income, tolls, and revenues of the Danville Company and its leased, operated, and controlled railroads, and each of them, and that the

## Southern Railway Co. v. Carnegie Steel Co., Limited

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*Southern Railway Co. v. Carnegie Steel Co., Limited*

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## Southern Railway Co. v. Carnegie Steel Co., Limited

security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For, even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control." The court further said: "The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mould his order that while favoring one injustice is not done to another. If this cannot be accomplished the application should ordinarily be denied. We think also that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is with-

## Southern Railway Co. v. Carnegie Steel Co., Limited

in the power of the court to use the income from the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders ; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. . . . No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act. The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration ; and that the amount of restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well-settled rules of equity jurisprudence to the facts of the case, as established by the evidence."

In *Hale v. Frost*, 99 U. S. 389, 25 L. Ed. 419, it appeared



*Southern Railway Co. v. Carnegie Steel Co., Limited*

that a receiver was appointed in a suit brought by trustees to foreclose mortgages executed by a railroad company. He was appointed May 19, 1875, at which time the company owed employees for back wages and was indebted for current supplies. To the Union Car Spring Manufacturing Company it was indebted for springs and spirals furnished in March and April before the appointment of the receiver, and which he continued to use. It was also indebted to Hale, Ayer, & Co. for supplies to the machinery department and for materials for construction purposes; and on the 13th day of February, 1873, a given amount was due them, as evidenced by the notes of the railroad company falling due on that day. The judges who heard the case in the court of original jurisdiction were divided in opinion on the following points made by intervening creditors: 1. That the railway mortgage was a prior lien only upon the net earnings of the road, after the payment of all the operating expenses, while the road was in the possession of the company. 2. That after the default in the payment of the interest November 1, 1873, the fact that the mortgagees funded their coupons and left the company in possession of the road constituted the company their agent and trustee in equity, and they were estopped from objecting to the payment from the earnings of the road of all legitimate debts contracted by the company for operating expenses. 3. That the net earnings of the road, while in the possession of the court and operated by its receiver, were not necessarily and exclusively the property of the mortgagees, but were subject to the disposal of the chancellor in the payment of claims which had superior equities, if such should be found to exist, and that the intervening petitioners' claims had superior equities to those of the mortgagees.

The petitions were dismissed and the interveners appealed. This court, speaking by CHIEF JUSTICE WAITE, said: "The first question certified in this case is answered in the affirmative, upon the authority of *Fosdick v. Schall*. The third question is answered in the same way upon the same authority. The Union Car-Spring Manufacturing Company is entitled to

*Southern Railway Co. v. Carnegie Steel Co., Limited*

payment in full, and Hale, Ayer, & Co. to payment of so much of their claim only as is for supplies to the machinery department. There is nothing in the case to show any special equities in their favor in respect to that part of their account which is for material for construction purposes. An answer to the second question is unnecessary."

In *Burnham v. Bowen*, 111 U. S. 776, 780-783, 28 L. Ed. 596, 598, 4 Sup. Ct. Rep. 675, 677-679, it appeared that the trustees of a mortgage covering all the property of a railroad company and all the revenues and income thereof, brought suit to foreclose the mortgage, and had a receiver appointed. In the order appointing the receiver no special provision was made for the payment of debts owing for current expenses. When the receiver took possession the railroad company was indebted for coal used on locomotives—a debt contracted by the company in the ordinary course of a continuing business, and which would have been paid out of current earnings at the time agreed on if the company had remained in possession. The debt due the coal company was evidenced by the acceptances of the railroad company, which were for different amounts, maturing a month apart, thus implying, as this court said, monthly settlements of monthly accounts, with a somewhat extended credit to meet the business requirements of the railroad company. A decree was entered finding the amount due to Bowen, the holder of the acceptances, and declaring that the mortgaged property in the hands of the trustees under the decree of foreclosure was equitably bound for the payment thereof.

CHIEF JUSTICE WAITE, delivering the unanimous judgment of this court, said: "In our opinion the view which the circuit court took of this case was the correct one. The company had never paid its bonded interest. From the very beginning it was in default in this particular, yet the mortgage trustees suffered it to keep possession and manage the property. The maintenance of the road and the prosecution of its business were essential to the preservation of the secur-

## Southern Railway Co. v. Carnegie Steel Co., Limited

ity of the bondholders. The business of every railroad company is necessarily done more or less on credit, all parties understanding that current expenses are to be paid out of current earnings. Consequently, it almost always happens that the current income is encumbered to a greater or less extent with current debts made in the prosecution of the business out of which the income is derived. As was said in *Fosdick v. Schall*, 99 U. S. 235, 252, 25 L. Ed. 339, 342, 'the income [of a railroad company] out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income.' Such being the case, when a court of chancery, in enforcing the rights of mortgage creditors, takes possession of a mortgaged railroad and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession, that is to say, pay out of what it receives from earnings all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the debts of the income should be paid from the income before it is applied in any way to the use of the mortgagees. The business of a railroad should be treated by a court of equity under such circumstances as a 'going concern', not to be embarrassed by any unnecessary interference with the relations of those who are engaged in or affected by it. In the present case, as we have seen, the debt of Bowen was for current expenses and payable out of current earnings. It does not appear from anything in the case that there was any other liability on account of current expenses unprovided for when the receiver took possession, and there is nothing whatever to indicate that this debt would not have been paid

Southern Railway Co. v. Carnegie Steel Co., Limited

at maturity from the earnings if the court had not interfered at the instance of the trustees for the protection of the mortgage creditors."

It was contended in that case that no part of the income, prior to the receiver's appointment, was used to pay mortgage interest or to put permanent improvements on the property, or to increase the equipment, and therefore there was no such diversion of the funds belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them. Touching that contention, this court said: "The debt due Bowen was incurred *to keep the road running*, and thus preserve the security of the bond creditors. If the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them. There is nothing to show that the receiver was appointed because of any misappropriation of the earnings by the company. On the contrary, it is probable, from the fact that the large judgment for the right of way was obtained about the same time the receiver was appointed, that the change of possession was effected to avoid anticipated embarrassments from that cause. But, however that may be, there certainly is no complaint of a diversion by the company of the current earnings from the payment of the current expenses. So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is

*Southern Railway Co. v. Carnegie Steel Co., Limited*

denominated in *Fosdick v. Schall* 'the current debt fund,' as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made. This rule is in strict accordance with the decision in *Fosdick v. Schall*, which we see no reason to modify in any particular."

The opinion in that case thus concluded: "We do not now hold, any more than we did in *Fosdick v. Schall* or *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258, 260, 25 L. ed. 345, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

In *Union Trust Co. v. Morrison*, 125 U. S. 591, 609, 612, 31 L. ed. 825, 830, 831, 8 Supt. Ct. Rep. 1004, 1009, 1010, the contest was between the mortgagees and Morrison, who had become surety in a bond given by an insolvent railroad company which was harrassed by suits in order to prevent a levy by a sheriff upon its rolling stock. Subsequently a suit was brought to foreclose a mortgage upon the railroad. The giving of the bond undoubtedly protected the company's property from seizure and enabled it to remain a going concern, and saved it to the mortgagees. This court, speaking by MR. JUSTICE BRADLEY, said: "Even if it [the rolling stock] would have subject to the mortgage, when taken on execution, nevertheless it could have been taken, † and this would necessarily have disturbed, and per-

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†The Constitution of Illinois of 1870, in which state the case arose, declared; article 11, § 10, that "the rolling stock and other movable

## Southern Railway Co. v. Carnegie Steel Co., Limited

haps interrupted, the operations of the railroad, by separating the property seized from the *corpus* of the estate. The trustees of the mortgage might have prevented such a catastrophe, it is true, by filing a bill of foreclosure and for an injunction and receiver; but they did not choose to take this course until nearly three years afterwards; on the contrary, they allowed the railroad company to continue to use the property, and to take care of it for them, and stood by and saw Morrison (who had no interest in the matter) put his hands into the fire and rescue the rolling stock of which they were to receive the benefit,—both directly, by receiving the property itself without contest or controversy, and indirectly, by keeping up the railroad as a going concern. Morrison's money, or the fruits of it, has gone into their pockets. And, in this regard, we make no distinction between the mortgagees, the bondholders, whom they represented, the nominal purchasers, Horsey and Canda, or the present company. They were all one and the same in interest. If the property became justly affected by the equity of the petitioner's claim, it remains so affected in the hands of the present company." Referring to prior cases, and disclaiming any purpose to modify the rule charging operating expenses upon current earnings, the court said: The present claim is of a different character, based upon a *bona fide* effort made by the intervener to preserve the fund itself from waste and spoliation after the mortgage was in arrears and the right to reduce it to possession had accrued. But even here, as we have seen, if the claimant could pursue only the earnings, it is shown that they have been appropriated to the purchase of property which has been added to the fund."

In *St. Louis A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 673, 31 L. Ed. 832, 837, 8 Sup. Ct. Rep.

property belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals."

Southern Railway Co. *v.* Carnegie Steel Co., Limited

1011, 1017, the court, speaking by MR. JUSTICE MATTHEWS, after stating that ordinarily the unsecured debts of an insolvent railroad company cannot take precedence in the distribution of the proceeds of a sale of the property itself over those creditors who are secured by prior and express liens, said: "There are cases, it is true, where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon a distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens." "The rule," the court said, "governing in all these cases, was stated by CHIEF JUSTICE WAITE in *Burnham v. Bowen*, 111 U. S. 776, 783, 17 Am. & Eng. R. Cas., 308, 28 L. Ed. 596, 598, 4 Sup. Ct. Rep. 675, 679, as follows: 'That if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.' There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all."

In *Kneeland v. American Loan & T. Co.*, 136 U. S. 89, 97, 34 L. Ed. 379, 383, 10 Sup. Ct. Rep. 950, 953, this court said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness, in preference to the mortgage liens sought to

## Southern Railway Co. v. Carnegie Steel Co., Limited

be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as a holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens." Again: "It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens." These principles were reaffirmed in *Thomas v. Western Car Co.*, 149 U. S. 95, 110, 37 L. Ed. 663, 668, 13 Sup. Ct. Rep. 824, in which it was held that the car company there seeking a preference over mortgage creditors had contracted upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity; consequently its claim to a preference was denied.

In *Virginia & A. Coal Co. v. Central R. & Bkg. Co.*, 170 U. S. 355, 365, 368, 42 L. Ed. 1068, 1072, 18 Sup. Ct. Rep. 657, 661, 662, the court, referring to the decision in *Burnham v. Bowen*, said: "It was thus settled that where coal is purchased by a railroad company for use in operating lines of railway owned and controlled by it, in order that they may be continued as a going concern, and where it was the expectation of the parties that the coal was to be paid for out of current earnings, the indebtedness, as between the party furnishing the materials and supplies and the holders of



Southern Railway Co. *v.* Carnegie Steel Co., Limited

bonds secured by a mortgage upon the property, is a charge in equity on the continuing income, as well that which may come into the hands of a court after a receiver has been appointed as that before. It is immaterial in such case, in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders, either in payment of interest on mortgage bonds or expenditures for permanent improvements upon the property. Nor is the equity of a current supply claimant in subsequent income arising from the operation of a railroad under the direction of the court affected by the fact that, while the company is operating its road, its income is misappropriated and diverted to purposes which do not inure to the benefit of the mortgage bondholders, and are foreign to the beneficial maintenance, preservation, and improvement of the property."

In the opinion in that case the court observed that it did not intend to detract from the force of the intimations contained in *Kneeland v. American Loan & T. Co.* and *Thomas v. Western Car. Co.*, above cited, "as to the necessity of the court of equity confining itself within very restricted limits in the application of the doctrine that in certain cases a court having a road or fund under its control may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims originating prior to a receivership." And it was further said: "In neither the *Kneeland* nor the *Thomas Case* was there any intention to question the prior decisions of the court, which allowed priority to claims based upon the furnishing of essential and necessary current supplies, not sold upon mere personal credit, against the surplus income arising during the operation of the road under the direction of a court of equity."

It is apparent from an examination of the above cases that the decision in each one depended upon its special facts. This court has uniformly refrained from laying down any rule as absolutely controlling in every case involving the

Southern Railway Co. *v.* Carnegie Steel Co., Limited

right of unsecured creditors of a corporation, whose property is in the hands of a receiver, to have their demands paid out of net earnings in preference to mortgage creditors. But it may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business shall be paid out of current receipts before he has any claim upon such income; that, within this rule, a debt not contracted upon the personal credit of the company, but to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company, may be treated as a current debt; that whether the debt was contracted upon the personal credit of the company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction; and that when current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use. The doctrine announced in *Burnham v. Bowen*—in which case the decisions in prior cases were affirmed—is thus expressed in the recent case of *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* above cited: "The dominant feature of the doctrine as applied in *Burnham v. Bowen* is that, where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company, a superior equity arises in favor of the materialman as against the mortgage bonds in the income arising, both before and after the appointment of a receiver from the operation of the property. The equity thus held to arise when a purchase of necessary current supplies is made by the owning company is not in any wise

## Southern Railway Co. v. Carnegie Steel Co., Limited

influenced by the fact that the company itself is the purchaser of the supplies, but is solely dependent upon the fact that the supplies are sold and purchased for use, and that they are used in the operation of the road, that they are essential for such operation, and that the sale was not made simply upon personal credit, but upon the tacit or express understanding that the current earnings would be appropriated for the payment of the debt."

Can the decree below be sustained consistently with these principles? Are the debts due the Carnegie Company of the class designated in the adjudged cases as current debts contracted, not on the personal credit of the railroad company, but in the ordinary course of its business, and to be met out of current receipts? As already said, whether the parties, seller and buyer, had in view only the personal credit of the latter, is to be determined in each case by its special facts, including the amount of the debt and the terms of payment.

All the rails furnished by the Carnegie Company were not supplied under one contract—a circumstance not to be ignored when determining whether the debts were of the kind that would ordinarily be met out of current receipts. The first contract between the Carnegie Company and the Danville Company was made June 10, 1891—within less than twelve months before the appointment of receivers in the Clyde suit. It called for the delivery by the Carnegie Company, during the month of July, 1891, of only 2,500 gross tons of rails for which the railroad company was to pay \$30 per gross ton, in its notes at four months from date of shipment *without interest*, with privilege of one renewal for three months with interest at the rate of 5 per cent per annum, and a second renewal for three months with interest at the rate of 6 per cent per annum. The railroad company reserved the option to increase by 200 or 300 the number of tons to be delivered, making the total delivery 2,700 or 2,800 tons. That option was exercised. By another arrangement between the parties entered into July 21, 1891, the contract was further extended to cover 1,656 tons of rails at the same

## Southern Railway Co. v. Carnegie Steel Co., Limited

price, terms, and delivery. Subsequently, by agreement of October 2, 1891, a provision was made for the delivery of 200 additional tons at the price of \$26 per ton. The delivery of the rails was in varying amounts and at different times between July 25, 1891, and October 10, 1891. The whole quantity delivered was 4,203 350-2240 tons, worth \$125,067.39. Notes were given by the railroad company, and they were renewed at their respective maturities. Those last given, and which were unpaid at the time of the institution of the Clyde or insolvency suit, were each payable at three months, except the last one, which was at four months. They were of the following dates and amounts: March 21, 1892, \$38,251.77; March 24, 1892, \$35,499.38; April 4, 1892, \$12,786.16; May 16, 1892, \$5,355.09; June 7, 1892, \$33,174.99. The first note was due June 21-24, 1892 (six days only after the appointment of receivers in the Clyde suit), and the last October 7-10, 1892.

The rails so received from the Carnegie Company were used by the Danville Company on the following roads in its possession and under its control: 1108.5 tons 56lb, \$33,174.99, on the Northeastern Railroad of Georgia; 1270 tons 70lb, \$37,713.75, on the Virginia Midland Railroad; 1793.5 tons 70lb, \$53,258.69, on the Richmond and Danville Railroad; 31.2 tons 70lb, \$920.56, on the Georgia Pacific Railroad. This use of the rails is shown by the report of special masters, and to that report on this point no exceptions were filed by either party.

What was the condition of the roads owned and controlled by the Danville Company at the time the rails were purchased and used? It was in the power of the railroad company and its receivers, who had possession of the books of the company, to have furnished evidence on this point that would have removed all possible doubt. But there is enough in the record to show that the rails purchased from the Carnegie Company were needed in order that the roads in ques-

## Southern Railway Co. v. Carnegie Steel Co., Limited

tion might be kept by the railroad company in that condition of safety which its duty to the public and to the mortgage bondholders required. In August, 1892, *immediately after the receivers took possession of the railroads constituting the Danville system*, they reported to the court that the financial difficulties of the Danville Company during the previous two years had "prevented the operating officers from being able to expend the proper amount *for new rails and upon the roadbed and structures to keep the railroad in the condition in which it should be maintained*, and it will be necessary for the receivers, during the summer and autumn, to make a much larger expenditure than they would for ordinary maintenance." Here is a direct admission by the receivers that during the *two years* immediately preceding their appointment the railroad company had not expended for new rails and upon the roadbed and structures the amount necessary to keep its road in proper condition. There is no evidence in the record which even tends to show that the statements of the receivers on this point were not strictly accurate. But this purchase of new rails proved to be inadequate; for on the 27th of January, 1894, the foreclosure receivers represented to the court, by petition, that "*for the proper and economical operation of the lines of railroad of which they are receivers, and for the safety of passengers and property transported over such roads, as required by the order of this court appointing such receivers, 2,000 tons of new steel rails are an absolute necessity*;" and that they "had negotiated with and purchased from the Carnegie Steel Company, Limited, subject to the approval of the court, that quantity of rail at a cost of \$24 per ton." The court made an order in accordance with that petition. Again, on the 13th day of April, 1894, the court—all parties to the foreclosure suit consenting thereto, including the bondholders' committee—made an order authorizing the receivers to purchase 2,500 tons of new steel rails in order "*to properly operate the railroads*" in their charge "*and for the safety of persons and property transported*."

## Southern Railway Co. v. Carnegie Steel Co., Limited

It is apparent that the purchases of new steel rails while the railroads were in possession of receivers were made in the ordinary course of business and were properly chargeable upon and payable out of current receipts in preference to the claims of mortgage creditors. In every substantial sense the expenses thus incurred were operating expenses. They were incurred in the interest of mortgage creditors, the value of whose securities depended upon the unity of the Danville system being preserved and the interests of all concerned not allowed to go to ruin. Why should a different rule be applied to the contracts made with the Carnegie Company *shortly before the appointment of receivers in the Clyde suit*, the original contract being for only 2,500 tons, and the last one for only 1,656 tons? Is it to be said that the contract for 2,000 tons of steel rails and the contract for 2,500 tons, made by the receivers in the foreclosure suit, created debts of a preferential character, while contracts made by the railroad company of exactly the same kind shortly before the appointment of receivers for 2,500 and 1,656 tons of steel rails could not under any circumstances become a preferential debt chargeable upon current receipts? Surely the quantity of rails purchased from the Carnegie Company and delivered in 1891 was insignificant in view of the interest involved and the extensive mileage of the Danville system, and was by no means so large as to suggest that they were to be used in constructing new and additional road, and not to keep existing roads in proper condition for use. Every railroad company must have on hand a limited quantity of rails in order to keep every part of its line in proper and safe condition. It is evident that the Carnegie rails purchased shortly before the receivers in the Clyde suit were appointed—the rails here in question—were obtained for the same reason that induced the subsequent purchases by the receivers. No one will say that the use of these rails did not add directly to the value of the securities of mortgage creditors. Within the

## Southern Railway Co. v. Carnegie Steel Co., Limited

reason of the rule adverted to, the debts contracted with the Carnegie Company were as much current debts in the ordinary course of the business of the railroad company as were the debts contracted by the receivers under the orders of court, when they purchased new rails to put the road in safe condition, or when they purchased at one time four passenger locomotives, and at another time eight passenger and freight locomotives, the cost of which was charged upon the income in their hands. Is it to be said that such expenses incurred by the receivers were preferential debts, but that debts incurred by the railroad company shortly prior to the receivership for rails needed to keep its road in safe condition for use are not of that class?

Preferential  
Claims upon Cur-  
rent Income—  
Material Fur-  
nished Prior to  
Receivership.

Same—Same—  
Effect of Taking  
Notes.

We next inquire whether it was not at the time the expectation of both parties, vendor and vendee, that the rails delivered by the Carnegie Company between July 25, 1891, and October 10, 1891, should be paid for out of the current earnings of the railroad company? The attendant circumstances require an affirmative answer to this question, although the parties did not in express words declare that the debts due contracted with the Carnegie Company were to be charged upon the current earnings of the railroad company. The quantity of rails was not so large as to preclude the expectation that they could be paid for out of the current earnings of the railroad company. As already said, it was a very small quantity for purposes of ordinary or necessary repairs, and there is nothing in the record to show that the Carnegie Company relied merely or exclusively on the personal credit of the railroad company. The renewal notes executed by the railroad company were *all within the three months, immediately preceding the appointment of the receivers*. The short credit given strongly indicates, and the fair inference from the record is, that the parties contemplated that the rails were to be paid for out of the current earnings of the railroad. The taking of notes does not indicate the contrary, but only shows that the vendor

## Southern Railway Co. v. Carnegie Steel Co., Limited

company preferred to have its debt evidenced by commercial paper which it could use, rather than to stand upon open account. In *Burnham v. Bowen* it was said : "When the receiver was appointed the debt was evidenced by business paper maturing at a future date. It was no waiver of any claim on the fund which might come into the hands of the receiver to renew the paper at maturity for the convenience of the holder. It was undoubtedly given originally to enable the coal company to use it as commercial paper if occasion required, and the renewal may have become desirable on account of the use which had been made of it." The equities of the creditor furnishing that which protected and preserved the mortgage security and materially increased its value are none the less because the original debt was evidenced by the notes of the company, taken for its convenience and renewed for its accommodation.

It may be said that a part of the rails furnished by the Carnegie Company were not used on the Danville railroad, although used on roads belonging to the Danville system. But that is not a controlling circumstance. The contracts were made with the Danville Company, and, as between the contracting parties, the debts so incurred were, under the circumstances stated, current debts chargeable upon the current receipts of the railroad company that purchased the rails. The rights of the Carnegie Company are none the less because the Danville Company chose, after obtaining the rails, to use a part of them on roads under its control and in its possession, and whose preservation in proper condition was vital to its successful operation. The scheme of reorganization was in the interest of the stockholders and mortgage creditors of the roads constituting the Danville system, and chiefly of the bondholders represented by the Central Trust Company, the trustee in the consolidated gold mortgage. That company, as we shall presently show, stood by and assented to, indeed approved, the application, for the benefit of the bond-

~~Same—Same—~~  
Effect of Using  
Rails on Leased  
Roads.



## Southern Railway Co. v. Carnegie Steel Co., Limited

and therefore to be preferred to claims of mortgage creditors, the next inquiry is whether the current receipts were applied during the receiverships for the benefit of the bondholders, or otherwise, when they should have been applied to the payment of current or preferential debts, including the debts due to the Carnegie Company.

During the insolvency or Clyde receivership, from June 17, 1892, to July 31, 1893, the net earnings were \$3,297,792.31. Among the items of expenditure during the same period were the following: Construction, \$232,134.34, of which \$19,717.05 was *for construction on the Danville road*; Equipment, \$81,390.32, of which \$74,733.28 was *for equipment on the Danville road*; Interest, Rentals, and Dividends, \$3,249,481.89, of which \$396,522.14 was *for the Danville road*, \$709,324 for the Virginia Midland, \$20,265 for the North Eastern, and \$232,127 for the Georgia Pacific road, the last four roads being those on which, according to the special master's report, the Carnegie rails were used; Sinking Fund, Richmond & Danville road, 5 per cent equipment mortgage, \$67,205; and Car Trust payments, \$209,500.

Between August 1, 1893, and December 31, 1893, out of the net earnings of the Danville system, excluding certain lines, the receivers paid among other sums the following: Construction *on Danville road*, \$9,232.61; Equipment on same road, \$6,791.35; Interest, Rentals, and Dividends, \$626,735.85, which included \$48,082.90 for the Danville road, Virginia Midland, 199,664.50, and \$87.50 for the North Eastern Railroad; Sinking Fund, Danville Company, equipment mortgage, \$37,790; Car Trust payments, \$51,160.

The above figures are found in the statement of the result of the operations of the Danville system for the periods named.

Looking at the cash statement of the receipts and disbursements of the Richmond & Danville Railroad alone, we find that from June 16, 1892, to July 31, 1893, the receipts were \$15,432,055.46. In this sum were included \$480,427.91 cash received from the Danville Company when the Clyde or insolvency receivers were appointed, and \$671,363.40 col-

Southern Railway Co. v. Carnegie Steel Co., Limited

lected on accounts turned over to those receivers by the railroad company. The disbursements during the above period were \$15,290,730.27, leaving in the hands of the receivers on July 31, 1893, \$141,325.19 in cash, which was turned over to the foreclosure receivers. The disbursements included among other items the following: Interest and Rentals, \$3,249,481.89; Car Trust payments and Sinking Funds, \$486,368.16.

The account of disbursements for the Danville road from August 1, 1893, to November 30, 1893, shows, among other things, the payment of Interest and Rentals, \$591,457.42; Car Trust payments and Sinking Fund, \$88,950.

The total floating debt of the Richmond & Danville Railroad remaining unpaid was \$318,324.71, of which \$22,186.53 represented a claim of the Western Union Telegraph Company in part for labor and supplies and in part for construction of telegraph line, and \$90,000 represented a claim of the Pullman Palace Car for mileage of cars. Of the balance, \$125,067.39 represented the claims of the Carnegie Company, and \$80,317.98 represented all other claims.

These figures show that both during the receivership in the Clyde suit and the receivership in the foreclosure suit immense sums were expended in paying interest, sinking fund, and car trust debts, and for construction and equipment, which were all for the benefit of mortgage creditors, and which, to the extent necessary, should have been applied in payment of preferential claims, including those of the Carnegie Company. It is a clear case of a diversion of income from the payment of current debts in the interest of mortgage creditors. JUDGE SIMONTON well said: "There can be no question that the steel rails furnished by the Carnegie Steel Company come within the class of supplies necessary to keep the railroad company a going concern. And the evidence establishes the fact that after incurring the debt the railroad company was in the receipt of large earnings, which were applied to permanent improvements, rentals, and interest on the mortgage debt; that the receivers who, under

Southern Railway Co. *v.* Carnegie Steel Co., Limited

the Clyde bill, took possession of the property, earned large income which was applied in the same way, leaving this debt unpaid; and that when these receivers were discharged they showed in their accounts a cash surplus, which was duly paid over to their successors under the Central Trust Company bill." Looking at the case in the light of the principle that a mortgagee cannot require from the mortgagor an account of the earnings, tolls, and income until he has made demand therefor or for a surrender of possession under the provisions of the mortgage (*Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 378, 31 L. Ed. 649, 698, 8 Sup. Ct. Rep. 887; *Fosdick v. Schall*, 99 U. S. 235, 253, 25 L. Ed. 335, 342), the circuit court of appeals also said: "When, therefore, the receivers appointed at the instance of stockholders and creditors took possession, they enjoyed the same right to the earnings and income which the railroad company enjoyed, and rightfully received them. As the railroad company would have been bound to use this income in the payment of the current expenses for labor and supplies, the receivers should have done so also. But, instead of this, the receivers diverted the earnings, income, and funds in their hands toward the betterment of the property, permanent improvements and additions to it, and payment of interest. And this was natural. They were appointed to take possession of the property and to conserve it until a plan of reorganization could be adopted and perfected. To facilitate this plan, the property must be kept up. To this end the funds coming from earnings were used. When the purpose of the first receivership was accomplished, the mortgage creditors came in and reaped the benefit. Surely those creditors whose claims were neglected, and from whom the earnings were diverted, have the right to ask and receive at the hands of the court the recognition and preservation of their claims." 42 U. S. App. 156, 76 Fed. Rep. 498, 22 C. C. A. 294. JUDGE MORRIS filed a concurring opinion, and took the same general view of the case as that expressed by JUDGE SIMONTON for the

Southern Railway Co. v. Carnegie Steel Co., Limited

court. He said that the case was that of "a supply creditor seeking to be paid out of the earnings which came to the receivers after his debt matured and which were diverted by them, without opposition from the mortgagee, to expenditures which directly resulted in preserving the mortgaged property, which earnings, if the receivers had not been appointed, there is no ground for supposing would not have been applied by the company to the payment of the supply creditor's debt." 42 U. S. App. 160, 161, 76 Fed. Rep. 501, 22 C. C. A. 298.

We must not be understood as saying that a general, unsecured creditor of an insolvent railroad corporation in the hands of a receiver is entitled to priority over mortgage creditors in the distribution of net earnings simply because that which he furnished to the company prior to the appointment of the receiver was for the preservation of the property and for the benefit of the mortgage securities. That, no doubt, is an important element in the matter. Before, however, such a creditor is accorded a preference over mortgage creditors in the distribution of net earnings in the hands of a receiver of a railroad company, it should reasonably appear from all the circumstances, including the amount involved and the terms of payment, that the debt was one fairly to be regarded as part of the operating expenses of the railroad incurred in the ordinary course of business and to be met out of current receipts.

Passing by as unnecessary to be determined some of the questions discussed by counsel, our conclusion is that as current earnings which should have been applied in meeting current expenses or liabilities, including the debt due the Carnegie Company, were diverted for the benefit of mortgage creditors, it was the duty of the court to see that that company was reinstated in its claim of priority over the mortgage creditors in the distribution or application of the net earnings of the property. That duty was properly performed by the Circuit Court, and the *decree* of the Circuit Court of Appeals affirming the judgment of the Circuit Court is *affirmed*.

Same—Diversion  
of Income—  
Rights of Unse-  
cured Creditors.

Southern Railway Co. v. Carnegie Steel Co., Limited

MR. JUSTICE BREWER, not having heard the argument in this case, did not participate in the decision.

MR. JUSTICE WHITE dissenting:

As I comprehend the record, the rails for which preferential payment is now allowed did not serve the purpose of ordinary repair and maintenance of the tracks in which they were laid. Moreover, my understanding of the proof is that it obviously shows there was no surplus revenue at any time legally applicable to the claim now allowed, and hence that no such revenue was diverted to the benefit of the foreclosing mortgage creditors during either of the receiverships by way of betterments or otherwise. Moreover, I think the proof is clear that, conceding every possible expense which can be claimed to have been a betterment or in any wise to have inured to the benefit of the foreclosing mortgage creditors, nevertheless as such mortgage creditors have contributed to the payment of the general creditors, by the assumption of receivers' certificates and cash contributions, a sum largely in excess of the amount of such payments for assumed betterments, etc., the mortgage creditors are entitled to credit for their advances, and therefore there would be a large balance in their favor. In effect, to state the presumed betterments and charge them against the foreclosing mortgage creditors, without referring to or taking into account their contributions, is to charge them for betterments for which they have already paid. *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 31 L. Ed. 832, 8 Sup. Ct. Rep. 1011.

I therefore dissent.

State v. Southern Ry. Co

STATE

v.

SOUTHERN RY. CO.

(*Supreme Court of North Carolina, Dec. 5, 1899.*)

**Indictments.**—Two indictments for the same offence are to be treated as two counts in the same bill; and, if either is good, the good indictment will support a verdict.

**Carriers of Passengers—Discrimination—Sufficiency of Indictment.**\*—An indictment charging unlawful discrimination by a railroad in giving a certain passenger free transportation is not defective merely because it fails to allege that at the same time, and on the same train, there were other passengers paying fare.

**Statutes—Re-enactment.**—The enactment of a statute in the terms of a former statute at the same time it repeals the prior statute is not a repeal, but is a reaffirmance of the former statute; and a day intervening between the repeal of the former statute and that on which the other goes into effect is merely *dies non*.

**APPEAL** by state from Burke county superior court.  
*Reversed.*

The following indictment was found against the defendant railroad: "The jurors for the state, upon their oath present that the Southern Railway Company, a common carrier, a corporation doing business in said Burke county, late of the county of Burke, on the 1st day of January, A. D. 1897, with force and arms, at and in the county aforesaid, unlawfully and willfully did give undue and unreasonable preference to one T. N. Hallyburton by giving said T. N. Hallyburton a free pass over the road of the said defendant company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. J. F. Spainhour, Solicitor." At a subsequent term a second

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\*See *State v. Southern Ry. Co.* (N. Car.), 11 Am. & Eng. R. Cas., N. S., 228.

## State v. Southern Ry. Co

indictment was returned, which reads as follows: "The jurors for the state, upon their oath present that on the 1st day of January, A. D. 1898, the Southern Railway Company was a corporation operating the Western North Carolina Railroad, a line of railway located wholly within the state of North Carolina, from Paint Rock, a point on the boundary line between the states of North Carolina and Tennessee, to Salisbury, in the said state of North Carolina, and doing the business of a common carrier in the said state of North Carolina, subject to the provisions of chapter 320, Pub. Laws 1891; and that the said Southern Railway Company required and received of persons traveling over its said line of railway a regular first-class passenger fare of three and one-quarter ( $3\frac{1}{4}$ ) cents per mile for each passenger. And the jurors aforesaid, on their oath aforesaid, do further present that the said Southern Railway Company, on the day [and] year aforesaid, at and in the county of Burke and state aforesaid, unlawfully and willfully did collect and receive from one T. N. Hallyburton a less compensation for the transportation of the said T. N. Hallyburton from the town of Morganton, in said county of Burke, a station on its line of railway, to the town of Salisbury another station thereon, in said state, than it collected, demanded, and received for the transportation of other passengers over its said line of railway from the said town of Morganton to the said town of Salisbury for a like and contemporaneous service in the transportation of passengers in its first-class carriage under substantially similar circumstances and conditions. And the jurors aforesaid, on their oath aforesaid, say that the said Southern Railway Company did then and there, in county and state aforesaid, and in the manner aforesaid, willfully and unlawfully and unjustly discriminate in the collection of passenger fares in favor of the aforesaid T. N. Hallyburton and against other persons to whom like and contemporaneous service was rendered, contrary to the form of the statute in such

## State v. Southern Ry. Co

case made and provided, and against the peace and dignity of the state. And the jurors aforesaid, on their oath aforesaid, do further present that on the 1st day of January, in the year of our Lord one thousand eight hundred and ninety-eight, the Southern Railway Company was a corporation operating certain lines of railway in the state of North Carolina as a system of trade, traffic, and transportation therein, and in the operation thereof was doing the business of a common carrier in the said state of North Carolina, subject to the provisions of chapter 320 of the Public Laws of 1891; and that the said Southern Railway Company demanded and received a regular passenger fare of three and one-quarter ( $3\frac{1}{4}$ ) cents per mile for passengers traveling in its first-class carriages over its said lines of railway. And the jurors aforesaid, on their oath aforesaid, do further present that the said Southern Railway Company, on the day and year aforesaid, and at and in the county aforesaid, willfully and unlawfully did make and give undue and unreasonable preference and advantage to one T. N. Hallyburton by then and there carrying the said T. N. Hallyburton as a passenger free of charge over its line of railway lying and situate wholly within the state of North Carolina, and known as the Western North Carolina Railroad, from the town of Morganton, in said county of Burke, to the town of Salisbury, in said state, the said North Carolina Railroad being then and there one of the lines of railway aforesaid operated by the said Southern Railway Company as a part of its system aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. Avery, Solicitor."

The Attorney General, *Avery & Avery*, and *Avery & Ervin*, for the State.

*F. H. Busbee*, for appellee.

CLARK, J. The two indictments are in law to be treated, says *State v. Perry*, 122 N. C., at page 1020, 29 S. E.



## State v. Southern Ry. Co

384, "as, in effect, two counts in the same bill (*State v. McNeill*, 93 N. C. 552; *State v. Johnson*, 50 N. C. 221); **Indictments.** and, if either is good, the good count will support a verdict (*State v. Toole*, 106 N. C. 736, 11 S. E. 168, and numerous cases there cited)"; and, of course, if either is good, the judgment quashing the bill was error. The defendant renews in this court his motion to quash for insufficiency of the indictment, as its refusal was not brought up by the appeal of the state. This he can do. Rule 27 of this court (119 N. C. 939, 22 S. E. viii.). The second count in the bill is so full and explicit as to need no discussion. It is, in substance, the same as that upon which a conviction for this offense was sustained in *State v. Southern Ry. Co.*, 122 N. C. 1052, 30 S. E. 133. Though not discussed in the opinion, the same motion was made and argued before us in that case, and the judgment sustaining the conviction necessarily implied that the objection to the validity of the bill was overruled.

The first count alleges that the defendant, a common carrier, unlawfully and willfully did give undue and unreasonable preference to one T. N. Hallyburton by giving said T. N. Hallyburton a free pass over the road of the defendant company. This is defective, in that it fails to allege that by virtue of such free pass said Hallyburton received free transportation, which would be an undue preference, forbidden by the statute, equally whether it was given upon a free pass from an official, or by a verbal order, or upon a ticket or mileage book not in truth paid for, but donated by the company. It is the fact of discrimination, and not the method by which it is done, which constitutes the offense; though the method of violation may, and doubtless should, be charged in the indictment, to the end that the common carrier may be more fully prepared to meet the charge. There are discriminations which require more explicit allegation,—as, for instance, illegal rebates upon freight charges, and the like (*U. S. v. Hanley* [D. C.] 71 Fed. 672); but, as the common carrier carries for hire, the allegation that it gave a person named undue preference by transporting him

## State v. Southern Ry. Co

free *ex vi termini* alleges discrimination. There are sections of the act creating this offense which authorize common carriers to grant free transportation in specified cases, but, not being within this section, it is not necessary in the indictment to make the negative averment that Hallyburton did not belong to one of the excepted classes. *State v. Harris*, 119 N. C. 811, 26 S. E. 198; *State v. Bynum*, 117 N. C. 749, 23 S. E. 218. If he did, it would be matter of defense. *State v. Downs*, 116 N. C. 1067, 21 S. E. 689; *State v. George*, 93 N. C. 567. If the short form set out in the first count had not been defective in the particular indicated, we are inclined to think (though we do not now pass upon it) it would have been sufficient. It would be no benefit to the defendant to require the solicitor to exhaust time and labor in drafting the long and tedious instrument which constitutes the second count, if a shorter allegation can express "the charge against the defendant in a plain, intelligible, and explicit manner," which is all the statute exacts. Code, § 1183. The general assembly has authorized the English form of indictment for murder (chapter 58, Laws 1887), which can be sufficiently and fully set out in three lines (*State v. Arnold*, 107 N. C. 861, 863, 11 S. E. 990); and all other indictments are greatly simplified (*State v. Ridge* [at this term] 34 S. E. 439, 440). Certainly information can be conveyed to a common carrier employing intelligent servants and attorneys that it is charged with violating the law against undue preference and discrimination by carrying a passenger free, without using the above prolix form covering 2 ½ printed pages,—more than 1,000 words.

Counsel argued to us that it must be charged and proved that at the same time, and on the same train, there were other passengers paying fare. We do not so understand the law (though this in fact is explicitly charged in the second count), for, as the common carrier carries for hire, it would have been equally a preference and discrimination against the public if this

Carriers of Pas-  
sengers—Dis-  
crimination—  
Sufficiency of  
Indictment.

## State v. Southern Ry. Co

had been a special train carrying a solitary deadhead, or a train composed entirely of that class, whirled away, possibly, to some political convention. In fact, either of these cases would be an aggravation of the offense, instead of an excuse. As the common carrier is dependent for its profits upon its receipts, the carrying of those free who should pay (not being in the class excepted by law) necessarily adds the cost of their transportation to the charges exacted of those who pay, and such cost would be increased if the train on a given occasion carries all its passengers free, whether it is one man only, in solitary and lonely state, or a car or train load; and this would equally violate another purpose of the law, which is to prohibit the many evil results which must be the necessary consequence of *quasi* public corporations having the power to discriminate in their charges. The subject need not be further treated from this standpoint, as the purpose and constitutionality of the statute have been fully and carefully considered by MONTGOMERY, J., upon a previous indictment against the same defendant. 122 N. C. 1052, 30 S. E. 133.

The other point, and the one principally relied on by the defendant, is that the statute under which the indictment was drawn (Laws 1891, c. 320, § 4) is repealed by chapter 506,

Laws 1899; but it was held at this term in  
Statutes—  
Re-enactment. State v. Beddingfield, 34 S. E. 412, that chapter 164, Laws 1899, creating the corporation commission, which was enacted on the same day as chapter 506, in effect re-enacted and continued in force chapter 320, Laws 1891. It necessarily follows, therefore, that this indictment has lost none of its vitality by virtue of an act which merely amended and continued in force the statute under which it was drawn. Nor, indeed, would the condition of the defendant be any better if the court had adopted the view presented in the dissenting opinion in State v. Beddingfield. That went upon the ground (so far as this matter is concerned) that the two acts, taken as a whole, were not the same.

## State v. Southern Ry. Co

But there was and can be no controversy that section 4, c. 320, Laws 1891, under which the defendant is indicted, is precisely the same, *in totidem verbis*, with section 13, c. 164, Laws 1899, which was enacted on the same day at which the former statute was repealed; and it was held in *State v. Williams*, 117 N. C. 753, 23 S. E. 250, as follows: "The reenactment by the legislature of a law in the terms of a former law at the same time it repeals the former law is not, in contemplation of law, a repeal, but it is a reaffirmance of the former law, whose provisions are thus continued without any intermission. *Bish. St. Crimes*, § 181; *State v. Sutton*, 100 N. C. 474, 6 S. E. 687." To same effect, *State v. Gumber*, 37 Wis. 298; *Code*, § 3766. Whatever difference of opinion there may be as to the essential identity of the two acts as a whole, there is none as to the section creating the offense for which the defendant is indicted. The provision that the former act should go out of existence after April 4th and that the new act should take effect after April 5th is not a break in the continuity of the existence of section 4, now section 13, but merely a suspension for one day of its operation. It had no effect upon this section, which was identical in both acts, other than to make April 5th a *dies non*; and the defendant could not have been convicted of this offense if committed on that day. Indeed, the decision of the court in *State v. Beddingfield* is that this is true of the entire act of 1891, and, as the greater includes the less, it would necessarily embrace the single section of the act for the violation of which the defendant stands indicted. The judgment quashing the indictment is set aside. This will be certified direct to the Western criminal court for Burke county, that it may proceed according to law. Reversed.

Chicago &amp; A. R. Co. v. Kelly

## CHICAGO &amp; A. R. CO.

v.

KELLY.

*(Supreme Court of Illinois, Oct. 19, 1899.)*

**Speed at Stations—Negligence.\***—Running a freight train at a high rate of speed past a station, just as a passenger train is pulling into the station from the opposite direction, is negligence, especially when the track upon which the freight train is moving is between the station and the track on which the passenger train is moving.

**Same—Killing of Mail Clerk—Rules.**—A transfer mail clerk, in attempting to remove mail from a platform between defendant's tracks at a station, has a right to rely upon a compliance with a rule requiring, when two trains arrive at the station on different tracks, at or about the same time, that the other train shall be held back from the station platform, until the one having the right of way has departed, even though he knows that the other train is approaching.

**Same—Same—Evidence—Post-Office Department Rule.**—In an action for the death of a transfer mail clerk, caused by one of defendant's trains, while he was making an attempt to take mail from a platform between the tracks at a station, after alighting from another of defendants' trains, a rule of the post-office department, requiring him to use extraordinary diligence in performing such duties, was admissible as evidence against defendant, as the presumption was that its employees were familiar with deceased's duties, and, therefore, should have anticipated his presence at the point where the accident occurred.

**Instructions.**—A party can take no advantage of a defect in an instruction given at his own request.

**Same—Damages.**—In such action, an instruction telling the jury that they, in estimating damages, may consider whatever they may, from the evidence, believe the widow and next of kin might have reasonably expected, in a pecuniary way, from the continued life of deceased is not objectionable.

**Contributory Negligence—Question for Jury.**—In such action, the court properly refused to instruct, at defendant's instance, that if

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\*See note at end of case.

## Chicago &amp; A. R. Co. v. Kelly

deceased did not look to see if the freight train by which he was killed was approaching, and if such failure to look was the cause of his death, there could be no recovery ; as whether such failure to look was contributory negligence was a question for the jury.

APPEAL by defendant from third district appellate court.  
*Affirmed.*

Appellee, as the administratrix of George J. Kelly, brought this suit against appellant for negligently causing the death of her intestate. A trial by jury resulted in a verdict and judgment against appellant for \$5,000, Case Stated. from which it appealed to the appellate court, where the judgment has been affirmed. The present appeal is from such judgment of affirmance. Appellee's intestate, at the time he was killed, was in the employ of the United States as transfer mail clerk at Bloomington, it being his duty to transfer mail to and from various trains arriving and departing from the Union Depot; the railroads intersecting at this point being two branches of appellant, with double track, the Big Four and Lake Erie & Western. On the night Kelley was killed the regular mail train for St. Louis was due at the station at 125 a. m., and upon its arrival upon the east track a freight train also arrived from the south upon the west track, and the two trains thus came to the station at the same time, the latter at a speed of from 10 to 25 miles per hour. The depot is situated on the west side of the two tracks, and between the tracks was a small platform where the mail from the south-bound trains was usually placed to be taken by the transfer clerk. To reach this platform from the depot, it was necessary to cross the west track upon which the freight train was approaching, and in attempting to do this Kelly was struck by the engine of the freight train, and instantly killed.

*John E. Pollock and Wm. Brown*, for appellant.

*Fifer & Barry, Frank Gillespie, and A. M. Conard*, for appellee.

## Chicago &amp; A. R. Co. v. Kelly

PER CURIAM. In deciding this case, the appellate court delivered the following opinion:

"The case was before us at a former time, and was then reversed, and the cause remanded, for reasons stated in the opinion of the court. 75 Ill. App. 490. So far as concerns the assignment of error by which the negligence of the appellant is brought in question, and the action of the trial court in refusing the peremptory instruction to find a verdict for appellant, we must accept the verdict of two juries, and our former opinion relative to these questions, as decisive of these points. The facts established by the evidence, relative to the alleged negligence of appellant by which the death of Kelly was occasioned, are not substantially different in the present record from those appearing in the former. When

Speed at Stations  
—Negligence.

the case was before us in the first instance we said: 'The running of a freight train at a high rate of speed past a station where a passenger train is receiving and discharging passengers is so plainly negligent as not to require comment. It is equally negligent to so run a freight train just as the passenger train is pulling into the station, and more especially when the track upon which the freight train is moving is between the depot and the track on which the passenger train is moving.' Accepting this quotation from our former opinion as binding authority in this case upon the point in question, as we think we must, under section 17 of the appellate court act, we come to consider the remaining question of fact presented by the assignment of errors and argument of counsel, whether the deceased was in the exercise of ordinary care for his own safety at the time he received his injuries, whereby his death was occasioned.

"To properly determine this question, it should be borne in mind that the appellee's intestate had been a transfer clerk in the United States mail service, at this junction, for more than a year before his death. It is reasonable to infer from his length of service he was acquainted with the rules of appellant in respect to the running

Same—Killing of  
Mail Clerk—  
Rules.

Chicago & A. R. Co. v. Kelly

of its trains, and that he would, in the exercise of ordinary care, conform his actions in respect thereto. The following rules were in force at this station at the time of the accident in question :

“ ‘Rule 13. Passenger Trains Standing at Stations on Double Track. Trains approaching a station where a passenger train may be standing, receiving, or discharging passengers must be stopped before reaching the passenger train, and must not be started before the passenger train moves forward. When two passenger trains, running in opposite directions, arrive at a station on double track at or about the same time, the train having the right of the road (on single track) will have the right to go to the station platform first, and the other train must stand back until the opposite train has discharged its passengers and departed.’

“ ‘Rule 26. The speed of trains must not exceed six (6) miles per hour through incorporated cities and towns on the line.’

“If, as contended by counsel for appellant, the deceased was notified that the freight train which killed him was coming, as well as the passenger train from which he was to receive mail, he had the right to rely upon appellant complying with its rule in this respect, and, relying upon it, he knew that the freight train would be stopped before reaching the passenger train, and that he could with safety do as he did. The freight train was not stopped as the rule required, resulting in the death of appellee's intestate. We think conclusions like this were fair and reasonable from all the evidence, and the jury were at liberty to infer ordinary care and diligence on the part of the deceased from all the circumstances of the case. To hold otherwise would be, in effect, to presume negligence on the part of one in excuse of negligence on the part of another. *Railroad Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358, and cases cited; *Railway Co. v. Hansen*, 166 Ill. 623, 46 N. E. 1071.

“It is insisted, also, that the court erred in the admission in evidence of the rule of the post-office department regulat-



## Chicago &amp; A. R. Co. v. Kelly

ing the conduct of clerks in the transfer of mail, which is as follows: 'Transfer clerks are expected to use extraordinary vigilance in guarding the mails under their charge, which must not be left for a moment exposed, day or night, and especially in making transfers where there is a considerable portage between trains. They should accompany the mails upon the wagons in all cases possible where there is no authorized clerk in charge of the same, and sit in such position, at all times, as to be able to instantly detect the loss of a pouch or sack.' It is well known the railroads have contracts with the government with respect to carrying mails. It is a part of their business as common carriers. They know, also, the government has in its employ various agents for the purpose of handling and transferring the mails, such as the appellee's intestate, and it should be presumed the employees of appellant were familiar with his duties, and might reasonably be expected to anticipate his presence at the time and place in question in the regular discharge of his duties. It is not unreasonable also to infer that appellant, being in a sense in the same line of employment with the deceased in handling the mail, was familiar with the rule in question, and was thereby informed of the duties of the deceased, and should have, in the exercise of ordinary foresight, expected his presence at the time and place in question in discharge of his duties under such rules, and to have regulated their trains with due regard to his safety. Considerations of this kind surely made the rule competent evidence for the consideration of the jury.

"It is next insisted that the court, in its instructions to the jury, gave two definitions of 'ordinary care,'—one at the request of appellee, by which it is defined to be such care as

**Instructions.**

a reasonably prudent person would exercise under the same or like circumstances; and at the request of appellant, that it is such care as a reasonably prudent person would exercise under the same or like circumstances while in the exercise of care, and not at a time

**Same—Same—  
Evidence—Post-  
Office Depart-  
ment Rule.**

Chicago & A. R. Co. v. Kelly

when such prudent person happened to be careless. We fail to see any substantial difference in the two statements of that which constitutes ordinary care, except that in the latter instance the instruction assumes that a prudent person would be careless,—an infirmity in appellant's own instruction of which it could take no advantage.

"It is also complained that the fifth instruction given for appellee, in which the jury are told they may, in estimating damages, consider whatever they may, from the evidence, believe the widow and next of kin might have reasonably expected, in a pecuniary way, from Same—Damages. the continued life of the intestate. We see no ground for the criticism put upon this instruction. What the widow and next of kin might reasonably expect would be the same as any other reasonable person might reasonably look forward to as something believed to be about to happen or come, and by this test the same question was submitted to the jury, as reasonable men, to say, from the evidence, what such reasonable expectation would be.

"Again, it is insisted the court erred in refusing to instruct the jury, at the instance of appellant, that if the deceased did not look to see if the freight train was approaching, and that by reason of his failure to look he was injured, he could not recover. In the later cases Contributory Negligence—Question for Jury. the tendency of the decisions has been to the effect that what is or what is not negligence is a question or fact for the jury, and it is improper to state such matter in an instruction. *Railway Co. v. Patchen*, 167 Ill. 204, 47 N. E. 368, and cases cited. In *Railway Co. v. Hansen*, 166 Ill. 623, 46 N. E. 1071, it is said: 'And formerly this court, in passing upon questions both of law and fact, frequently prescribed that same duty (to look and listen), but it has since been repeatedly held that it cannot be said, as a matter of law, that a traveler is bound to look or listen, because there may be various modifying circumstances excusing him from so doing. \* \* \* It seems to us

## Note

impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise, and the question what a reasonably prudent person would do for his own safety, under the circumstances, must be left to the jury as one of fact.' In *Partlow v. Railroad Co.*, 150 Ill. 321, 37 N. E. 663, the court say: 'It has often been said by this and other courts that it is the duty of a person approaching a railroad crossing to look and listen before attempting to cross, and that a person failing to observe this precaution is guilty of negligence; but, when the statement has been made, the court, as a general rule, was discussing a question of fact, and in such case the statement may be regarded as accurate. But the court cannot say, as a matter of law, that the failure to look and listen is negligence. These facts are proper for the consideration of the jury in determining whether a person has been negligent, but it cannot be said, as a matter of law, that the failure to observe such acts is negligence,'—citing *Railway Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Railroad Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20; *Railroad Co. v. Wilson*, 133 Ill. 55, 24 N. E. 555. It follows, therefore, that the instructions upon this point were properly refused. Finding no material error in the record, the judgment of the circuit court will be affirmed."

We concur in the conclusion reached by the appellate court and in views above expressed. Accordingly, the judgment of the appellate court is affirmed. Judgment affirmed.

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NOTE.

**Carriers of Passengers—Running Train between Car and Station.**—It is negligence to run a train, without warning, at a high rate of speed past a station at which another train has stopped and is discharging passengers, many of whom must cross the track upon which the train is running in order to reach their homes. *Robostelli v. New York, N. H. & H. R. Co.*, 34 Am. & Eng. R. Cas. 515, 33 Fed. Rep. 796; *Denver & R. G. R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac.

## Note

Rep. 954; Chicago, etc., Ry. Co. v. Ryan (Ill.), 46 N. E. 208; Gonzales v. New York & H. R. Co., 39 How. Pr. (N. Y.) 407; Terry v. Jewett, 78 N. Y. 338; *affirming* 17 Hun 395; Klein v. Jewett, 26 N. J. Eq. 474; *affirmed in* 27 N. J. Eq. 550; Armstrong v. New York C. & H. R. Co., 66 Barb. (N. Y.) 437; *affirmed in* 64 N. Y. 635, *mem.* See also Warner v. Railroad Co., 168 U. S. 339, 18 Sup. Ct. 68; Graven v. MacLeod (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 305.

The plaintiff, while undertaking to cross a track between the station-house and the train he desired to enter, was struck and injured by defendant's train which came along on such intervening track. *Held*, that the defendant was guilty of gross negligence; that whether plaintiff was chargeable with contributory negligence in attempting to cross without looking, was for the jury. Hirsch v. New York & G. L. R. Co., 25 N. Y. S. R. 156, 53 Hun 633, *mem.*, 6 N. Y. Supp. 162; *affirmed in* 125 N. Y. 701, *mem.*, 34 N. Y. S. R. 1012.

A passenger was struck by an engine between the walls of a depot and a platform while attempting to get on a train. There was evidence that the view of the engine was cut off, and that there was much noise at the time, so its approach could not be heard. There was other evidence that he ran from the depot carelessly after seeing the train. *Held*, the case was one proper for the jury. Jones v. East Tenn., V. & G. R. Co., 128 U. S. 443, 9 Sup. Ct. Rep. 118. See also Beecher v. Long Island R. Co. (N. Y.), 12 Am. & Eng. R. Cas., N. S., 295 and *note*.

But as to a person who leaves a train before it arrives at the station, with intervening tracks between him and the passenger platform, it is not, as matter of law, negligence on the part of the company to run trains or engines rapidly past or through the station at such a time on such intervening tracks. Parsons v. New York C. & H. R. Co., 37 Hun (N. Y.) 128.

To propel a hand-car past a station at the rate of 15 miles an hour, on a down-grade, without a bell or other notice, at an hour when passengers are gathering to take a train, is negligence; and the negligence is rendered more pronounced and striking by the fact that a freight train was lying in front of a station, which would tend to attract attention and to some extent obscure the view. Conklin v. New York C. & H. R. R. Co., 43 N. Y. S. R. 414, 63 Hun 628, 17 N. Y. Supp. 651.

Bader v. Southern Pac. Co

BADER

v.

SOUTHERN PAC. CO.

*(Supreme Court of Louisiana March 19, 1900.)*

**Ejection of Passenger—Mistake of Conductor—Increasing Damages.\***—Where a passenger, by reason of the mistake of the conductor in giving him a check, is ejected from a train before reaching his destination, he should not increase the damage, and cannot recover for loss or injury which is not the consequence of the wrong done him, but of his own willful acts of omission or commission.

(Syllabus by the Court.)

APPEAL by defendant from parish of Orleans civil district court. *Modified.*

*Denegre, Blair & Denegre*, for appellant.

*A. E. & O. S. Livaudais*, for appellee.

MONROE, J. Plaintiff claims \$5,000 as damages, actual and exemplary, said to have been sustained by reason of his alleged forcible and unlawful ejection from a passenger train. Defendant pleads the general denial. We find the following facts to be sustained by a preponderance of evidence, and probability, to wit: Plaintiff, who was about 63 years old, bought a ticket from New Orleans to Lafayette, intending to go from there, by private conveyance, to Breaux Bridge, there to spend the summer among his family connections, and ply his trade of shoemaker. Shortly after the train left New Orleans, the conductor took up his ticket, and placed in his hat a slip, or conductor's check, which indicated that his destination was Franklin, a station over 40 miles short of Lafayette. The plaintiff did not get off at Franklin, and when the train reached Baldwin, 4 miles further on, he was

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\*See *Louisville & N. R. Co. v. Hine* (Ala.), 14 Am. & Eng. R. Cas., N. S., 382, and *note*, 391 *et seq.*

*Bader v. Southern Pac. Co*

notified that he had passed his station. He said that he wanted to go to Lafayette. The conductor replied that he had better get another ticket; and either the conductor, or some other train official, intimated, or told him in words, that he must get off the train. There was, however, very little said or done. The plaintiff is a man of limited intelligence, and appears to have made no protest or explanation, nor did he insist upon his right to be carried to Lafayette, or offer to pay additional fare. Nor, upon the other hand, was any force or objectionable language offered to him. After he had left the train, or while leaving, he said that he would "claim the case," meaning that he would make a claim for damages. From Baldwin to New Iberia is 20 miles, from New Iberia to Lafayette 19 miles, and from Lafayette to Breaux Bridge 8 miles. Breaux Bridge may, however, be reached by going from Baldwin to New Iberia, from New Iberia to St. Martinsville, 14 miles, and from St. Martinsville to Breaux Bridge 12 miles; and the plaintiff selected the latter route, for reasons which will appear. He says that he had about 70 cents in his pocket. That amount would have carried him, on the next train, some few miles beyond New Iberia. But he chose to walk. His story is that he left Baldwin between 12 and 1 o'clock on Saturday, a little while after his arrival, and walked in the direction of New Iberia; that night overtook him on the way, and he laid down on the railroad track, and went to sleep, and was awakened by a train which came near running over him, but that he could not tell whether it was running towards New Orleans or in the other direction. He reached New Iberia, and thence passed on to St. Martinsville, the next day. He had lived in St. Martinsville for 25 years; had raised a family there; and had a brother-in-law living there, who received him into his house, where he remained during Sunday night. The brother-in-law then offered to arrange to get a conveyance to carry him on to Breaux Bridge, but the plaintiff declined the offer, though he says that he was pretty well worn out. He accordingly started on Monday morning to walk the

## Bader v. Southern Pac. Co

balance of the way, say about 12 miles, and this distance he claims to have accomplished with much difficulty and suffering, walking the whole distance, with the exception of a half mile, when he was given a ride in a buggy, and the last 2 miles, over which he rode in a wagon, his feet being so swollen, bruised, and inflamed that he was laid up with them, and for a month or two was obliged to wear slippers, or loose shoes. The evidence leaves no doubt upon our minds that a mistake was made by the conductor in giving the plaintiff a check which called for Franklin, instead of Lafayette. We feel equally satisfied that, when he had passed Franklin, the conductor, in the belief that he had traveled further than he was entitled to travel on the ticket which he had purchased, would have put him off by force, unless he had made some satisfactory explanation, or had been willing to pay additional fare, though, as a matter of fact, no force was used, and no harsh language. The plaintiff, however, as we have stated, offered no explanation, and seems to have made no protest. He had in his pocket a baggage check showing that his trunk had been checked to Lafayette, and, under the rules of the company, such a check would not have been issued save upon the exhibition of a passenger ticket to the same place; but it did not occur to him to show it. After getting off the train, he might have purchased a ticket, which would have carried him at least to New Iberia, and beyond, but he chose to walk. It does not appear that he made any attempt to obtain shelter on Saturday night, or that there was any particular reason why he should have chosen the railroad track as a bed upon which to sleep. During the night of the 28th of May the mere fact of his being out of doors was no great hardship, but the railroad track was neither a comfortable bed nor a safe one; and we imagine that he might, without much effort, have done better. It seems strange, too, that when he reached New Iberia, only 14 miles from a town in which he had lived for 25 years, in a country where his family had grown up and married, and where he had brothers-in-law and sons-in-law

*Bader v. Southern Pac. Co*

scattered about, some at St. Martinsville and some at Breaux Bridge, and others, perhaps, elsewhere, he should not have found some one who would have been willing to save him the necessity of walking further. His son-in-law Mr. Nason was to have sent a buggy to meet him at Lafayette, and in fact did so. It appears that he could have been reached by telephone, so that the plaintiff might have paid his fare from Baldwin to New Iberia, and have then arranged for his further transportation by speaking (through the telephone) to his son-in-law, if he knew no one in New Iberia; or, having walked to New Iberia, he could have paid his fare to St. Martinsville, and put up with his brother-in-law until arrangements were made for his transportation beyond that point. He, however, not only made no effort to help himself, but he refused assistance when it was offered to him; and, if his tramp from St. Martinsville to Breaux Bridge occasioned him physical suffering, and his feet were swollen and bruised when he reached the latter place, it was almost entirely his own doing. Under these circumstances, we are of opinion that \$750 is an excessive amount to allow in the way of damages. The railroad company made a mistake, and they must suffer the consequences. But the injury done to the plaintiff was not intentional. There were no circumstances of aggravation connected with it, and the suffering of which the plaintiff complains was not so much the consequence of the mistake as of his willful purpose to make the situation worse, instead of better. In *Judice v. Southern Pacific Co.*, 47 La. Ann. 257, 16 South. 816, it appears that the plaintiff was carried a little over two miles beyond her station; that she insisted that the train should back to the station; and that she refused to wait an hour for another train, or to avail herself of a handcar, which was at her service, but walked back over the car track, though there was a public road which she might have taken. This court said, quoting from *Beers v. Board*, 35 La. Ann. 1132: "The authorities agree that, after a wrong has been committed, the damaged party



*Bader v. Southern Pac. Co*

shall not increase it, and that, if he does, he shall have no right to complain for loss or injury sustained in consequence of his willful acts of commission or omission;" and a judgment in favor of the plaintiff was reduced from \$50 to \$3, the plaintiff paying the costs of the appeal. In *Dave v. Steamship Co.*, 47 La. Ann. 576, 17 South. 128, it appeared that plaintiff was carried about 1,800 feet beyond his station, on a rainy night, and was then ejected; and he also complained of harsh language. He was allowed \$50, and the judgment was affirmed. In *Morse v. Duncan* (C.C.) 14 Fed. 396, it was said, "No recovery can be allowed for any inconvenience or physical hardship, when the same was undertaken voluntarily." And in *Spry v. Railway Co.*, 73 Mo. App. 203, the court said, "If a passenger can find shelter where he is wrongfully put off, he cannot recover for injuries received in voluntarily walking to his destination." In the case before us, time was of no importance to the plaintiff. He was going to the country to spend the summer, and whether he reached Breaux Bridge on Saturday or Monday was a matter of no consequence. He was not insulted in any way, and we doubt very much whether any one, save the conductor and the gateman of the train, knew of what occurred at Baldwin, unless they were told by the plaintiff. Under these circumstances we think that \$250 would reasonably compensate him for the injury sustained. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount allowed from \$750 to \$250, and, as thus amended, that it be affirmed; the plaintiff to pay the costs of the appeal.

Goldberg v. Ahnapee & W. Ry. Co

GOLDBERG *et al.*,

*v.*

AHNAPEE & W. RY. CO.

(*Supreme Court of Wisconsin, Nov. 24, 1899.*)

**Carriers of Passengers—Liability for Baggage Stored for Transportation.\***—A carrier of passengers, in respect to ordinary baggage stored with it for transportation, is liable only as a bailee for ordinary care.

**Same—Same—Delivering Baggage Earlier than Necessary.**—A passenger delivering his baggage at the station before it is necessary to do so in order to have reasonable time for obtaining his ticket, checking the baggage, etc., cannot thereby render the carrier liable as an insurer of the baggage without its consent.

**Same—Same—Reasonable Time.†**—It cannot be held, as a matter of law, that so 30 minutes before train time is not reasonably sufficient for obtaining a ticket, checking baggage, etc., nor that 12 hours is reasonable time for such purposes.

**Harmless Error.**—Harmless error is not reversible error.

**Parol Testimony.**—Any objection to parol testimony as to the contents of a card tacked up in a depot, prohibiting the checking of baggage until within half an hour of train time, is obviated by proof that it has been destroyed in the burning of the station.

**APPEAL**, by plaintiffs from Door county circuit court.  
*Affirmed.*

One of the plaintiffs, a traveling man, sent his trunks, containing merchandise, and not baggage, to the station of the defendant railway company at about 5 o'clock on the evening of January 27, 1897, intending to check them as baggage the next morning on a train leaving about 6 o'clock. During the night they were

Case Stated.

\*See able article by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., 1 *et seq.* See also *note*, 5 Am. & Eng. R. Cas., N. S. 68.

†See able article by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., 1 *et seq.*

Goldberg v. Ahnapee &amp; W. Ry. Co

destroyed by fire, without fault or negligence of the defendant. Suit was brought for their value, and verdict found for the defendant on instructions not excepted to, from judgment on which this appeal is brought. Plaintiff moved to set aside the verdict as against the evidence. There was evidence tending to show that the contents of the trunk were not properly baggage, but merchandise; that the plaintiff Leopold Goldberg sent the trunks to the station the night before because it would be inconvenient and more expensive in the morning; that they were delivered in the freight house by his drayman without the knowledge of the defendant or its station agent; that, though the trunks were noticed when the freight house was shut up in the evening, the agent had no knowledge of their ownership, or the purposes for which they had been so left; that the rules of the defendant company prohibited the checking of baggage until a half hour before train time, which plaintiff knew. There was conflict as to some of the facts stated above, and as to other facts, which it is unnecessary to mention.

*Felker, Doe & Felker and Y. V. Dreutzer*, for appellants.

*Greene, Vroman, Fairchild, North & Parker*, for respondent.

DODGE, J. (after stating the facts). 1. The liability of a carrier for ordinary baggage while in its possession for carriage as such is very different from the liability while the same articles are in storage with it. In the first case it is an insurer; in the latter, liable only as a bailee for ordinary care. The exact point at which the possession for carriage begins and ends is not easy to define, but it is not such as to exclude some reasonable time at stations before and after actual transportation. After transportation the higher liability continues only for such time as is reasonably necessary to present duplicate checks and to remove the baggage. *Hoeger v. Railway Co.*, 63 Wis. 100, 23 N. W. 435. No reason is apparent why the same rule should not apply to the delivery for

Carriers of Passengers—  
Liability for Baggage Stored for Transportation.

Goldberg v. Ahnapee & W. Ry. Co

transportation, so that the owner has the right to deliver at the station such time before starting of train as may be reasonably necessary for obtaining ticket, checking the baggage, etc., and that he cannot impose this extreme liability by earlier delivery without the consent of the carrier. *Green v. Railroad Co.*, 38 Iowa, 100; *Goodbar v. Railroad Co.*, 53 Mo. App. 434. This defendant had, by a rule known to plaintiff, prescribed 30 minutes before train time as such reasonable time. It certainly cannot be said, as matter of law, that such limit is unreasonable, nor that 12 hours is reasonable, or was rendered reasonably necessary by the circumstances.

Same-Same-  
Delivering Bag-  
gage Earlier than  
Necessary.

The submission of that question to the jury was not an error of which plaintiff can complain.

Same-Same-  
Reasonable Time.

As to whether defendant assented to such delivery, and accepted plaintiff's trunks for carriage as baggage, with knowledge of their contents, was a disputed question of fact, and a finding in the negative has abundant support in the evidence.

2. The overruling of the objection to the testimony of defendant's agent, Reitzel, that there was no advantage to the company in having the trunks delivered the night before, was without prejudice; for it appeared by plaintiff's own testimony that the agent was prohibited from checking baggage until half an hour before train time, and that the convenience of the company obviously could not be enhanced by delivery of baggage earlier than that time.

3. Parol proof of the substance of the rules, printed on a card and tacked up in the depot, prohibiting checking until within half an hour of train time, could not have prejudiced plaintiff, for he testified that he had knowledge of such a rule. Further, any objection to parol testimony as to the contents of such card was obviated by proof that it had been destroyed in the burning of the station.

Harmless Error.

Parol Testimony.

We find no reversible error in the record. Judgment affirmed.

Clark v. Russell

CLARK *et al.*

v.

RUSSELL.

*(Circuit Court of Appeals, Eighth Circuit, Nov. 13, 1899.)*

**State Statutes—Constitutional Law—State Decisions.**—A decision of the court of last resort of a state, maintaining that a statute of the state is not repugnant to the state constitution, is binding on all other courts.

**Injury to Passenger—Lex Loci.\***—A statute of Nebraska provides that a railroad company shall be absolutely liable for injuries to passengers, whether to person or property, except in cases where the injury done arises from the criminal negligence of the person injured, or is caused by his violation of an express regulation of the company actually brought to his notice. *Held*, that such statute, so far as its provisions extend, furnishes the measure of the plaintiff's right to recover for a passenger's injury on a railroad in the state, in whatever jurisdiction the action is brought.

**Same—Statutory Liability—Federal Constitution.**—Such statute is not repugnant to the federal constitution.

**ERROR** by defendants to the circuit court of the United States for the District of Colorado. *Affirmed*.

Emma Russell, the defendant in error and plaintiff below, was a passenger on a train on the Union Pacific Railroad, which at the time was operated by S. H. H. Clarke, E. Ellery Anderson, Oliver W. Mink, John W. Doane, and Frederick R. Coudert, as receivers, the plaintiffs in error and defendants below. The car in which she was riding was derailed while the train was in the state of Nebraska, and she received the personal injuries for which she brought this action in a state court in Colorado, from whence it was removed by the defendants into the United States circuit court for that district. She recovered judgment in the circuit court, and the defendants sued out this writ of error.

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\*See extensive *note*, 12 Am. & Eng. R. Cas., N. S., 711 *et seq.*

Clark v. Russell

*Willard Teller* (*H. M. Orahood*, on the brief), for plaintiffs in error.

*E. F. Richardson* (*T. M. Patterson* and *H. M. Hawkins*, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THEYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court. The only error assigned which challenges our attention is that the circuit court erred in giving effect to a statute of Nebraska which reads as follows:

State Statutes—  
Constitutional  
Law—State Decisions.

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when this injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." Comp. St. Neb. c. 72, § 3.

This statute was enacted in 1867, and has been enforced, and its constitutionality upheld, from that time up to the present, by a long line of the decisions of the supreme court of that state. *Chollette v. Railroad Co.*, 26 Neb. 159, 37 Am. & Eng. R. Cas. 16, 41 N. W. 1106, 4 L. R. A. 135; *Railroad Co. v. Chollette*, 2 Am. & Eng. R. Cas., N. S., 225, 33 Neb. 143, 49 N. W. 1114; *Railway Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Railway Co. v. Porter*, 38 Neb. 226, 56 N. W. 808; *Railroad Co. v. Hague*, 4 Am. & Eng. R. Cas., N. S., 476, 48 Neb. 97, 66 N. W. 1000; *Railroad Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434; *Railway Co. v. Chollette*, 41 Neb. 578, 59 N. W. 921; *Railroad Co. v. Hedge*, 2 Am. & Eng. R. Cas., N. S., 220, 44 Neb. 448, 62 N. W. 887; *Railroad Co. v. French*, 48 Neb. 638, 67 N. W. 472. These cases dispose of the contention that the act is repugnant to the constitution of the state. That is a question of state law, upon

Clark v. Russell

which the decision of the supreme court of the state is binding on all other courts.

It is next claimed that the right of action which accrued to the plaintiff under this statute in Nebraska cannot be asserted in the courts of any other jurisdiction. The contention is not sound. This is not a penal, but a remedial, statute, and the plaintiff's action is not for the recovery of a penalty, but for the recovery of compensation for an injury for which the statute gives the right of action. It is not a statute establishing a rule of evidence, but a statute giving a substantive right of action. It extends the common-law liability of carriers of passengers by rail, and augments the right of action of the injured passenger, in the exact proportion that the common-law liability of a railroad company is enhanced. The statute makes the railroad company absolutely liable for an injury to a passenger, "except in cases where the injury done arises from a criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." A passenger who sustains an injury on a railroad in Nebraska has an absolute right to recover for that injury, unless he comes within the exceptions of the statute. That right attaches at the moment of the injury, and adheres in it until satisfaction is made. The action is transitory, and may be asserted in any jurisdiction, and in whatever jurisdiction it is asserted the Nebraska statute furnishes the measure of the plaintiffs' right, so far as its provisions extend. In *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439, the supreme court of the United States lays it down as a rule that "wherever, by either the common law or the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." *Herrick v. Railway Co. (Minn.)*, 16 N. W. 413; *Railroad Co. v. Rich-*

*Injury to Passenger—Lex Loc.*

## Clark v. Russell

ardson, 91 U. S. 454, 23 L. Ed. 356; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *First Nat. Bank v. Weidenbeck* (decided at the present term) 97 Fed. 896; *Railroad Co. v. Mase's Adm'x*, 27 U. S. App. 238, 11 C. C. A. 63, and 63 Fed. 114.

A further contention of the plaintiffs in error is that the statute violates the fifth and fourteenth amendments of the constitution of the United States, in that it deprives the railroad company of its property "without due process of law," and denies to it the equal <sup>Same—Statutory Liability—Federal Constitution.</sup> protection of the laws. The fifth amendment has no application to the states, and in no way affects their powers. In all jurisdictions inferior to the supreme court, we think it must be regarded as settled for the present that statutes imposing an additional, or even absolute, liability on railroads for injuries to passengers or property are not repugnant to the constitution of the United States. A statute of Missouri made every railroad company operating a railroad in that state absolutely responsible in damages for property injured or destroyed by fire communicated by its locomotive engines, and declared a railroad company had an insurable interest in property along its route that authorized it to insure such property. The question whether this statute was repugnant to the constitution of the United States came before the supreme court in the case of *Railway Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 6 Am. & Eng. R. Cas., N. S., 1903, 41 L. Ed. 611. The contention of the railroad company in that case was exactly what the contention of the plaintiffs in error is in the case at bar. In the introduction to the opinion the court said:

"It has been strenuously argued, in behalf of the plaintiff in error, that this statute is an arbitrary, unreasonable, and unconstitutional exercise of legislative power, imposing an absolute and onerous liability for the consequences of doing a lawful act and of conducting a lawful business in a lawful and careful manner, and that the statute violates the consti-



## Clark v. Russell

tution of the United States, by depriving the railroad company of its property without due process of law, by denying to it the equal protection of the laws."

After a learned and exhaustive review of all the cases, the court unanimously held the act constitutional, concluding their opinion with the declaration:

"The statute is not a penal one, imposing punishment for a violation of law, but it is purely remedial, making the party doing a lawful act for its own profit liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered. *Railroad Co. v. Richardson*, 91 U. S. 454, 472, 23 L. Ed. 356; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. The statute is a constitutional and valid exercise of the legislative power of the state, and applies to all railroad corporations alike. Consequently it neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor yet denies to it the equal protection of the laws."

In their opinion, the court cite numerous statutes which impose liability on railroad companies wholly independent of negligence on their part, and show that the courts have uniformly maintained their validity. A statute in Massachusetts made the liability of a railroad company for the destruction of property by fire communicated from its locomotive engines absolute, and not dependent upon negligence on its part. The supreme judicial court of Massachusetts held this act valid upon grounds that have ever since been held to be sufficient to uphold such legislation. CHIEF JUSTICE SHAW, delivering judgment, said:

"We consider this to be a statute purely remedial, and not penal. Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger; and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, danger-

Clark v. Russell

ous though they are, and so they cannot be regarded as a nuisance. The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it." *Hart v. Railroad Corp.* (1847) 13 Metc. (Mass.) 99.

Similar statutes, imposing a liability upon the railroad company wholly independent of negligence on its part, exist in Vermont, Maine, New Hampshire, Connecticut, Iowa, Missouri, Colorado, South Carolina, and probably other states, and their constitutionality has invariably been upheld. A Kansas statute made railroad companies doing business in that state liable for all damages done to an employee in consequence of the negligence of other employees. In *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, the statute was assailed as unconstitutional, and the supreme court, in answer to that contention, said :

"The contention of the company, as we understand it, is that the law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken, and thus authorizes, in such cases, the taking of property without due process of law, in violation of the fourteenth amendment. The plain answer to this contention is that the liability imposed by the law of 1874 arises only for injuries subsequently committed. It has no application to past injuries, and it cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every state. The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with

Clark v. Russell

clauses of the fourteenth amendment. The supposed hardship and injustice consist in imputing liability to the company where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine, and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow servant in the same general employment, and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt."

The latest expression of that court upon the general question under consideration is found in the case of *Railroad Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909. In that case the court had under consideration a statute<sup>1</sup> of Kansas relating to the liability of railroads for damages by fire, which provided that, in all actions commenced under the act, if the plaintiff recovered he should be allowed a reasonable attorney's fee, to become part of the judgment, and the court held the statute constitutional.

A railroad company owes a duty to its passengers to carry them safely. A passenger is powerless to protect himself from injury resulting from derailment or wreck of the car or from other causes. He is in the care and keeping of the railroad company, and has no knowledge of the roadbed, rails, cars, locomotive engines, or other appliances or fixtures, or of the management and conduct of the train, or of the fitness of its employees, and is frequently unable to locate the cause of the wreck, and convict the company of negligence,

## Clark v. Russell

though the company may have been guilty of negligence. The company, in such cases, can easily produce evidence of due care which the passenger cannot be prepared to meet. It was considerations similar to these that led to the legislation making the railroad company absolutely liable for the damages resulting from fire escaping from its locomotive engines. And we may add that they are quite as forcible as any that are given for the adoption of the rule that made a common carrier an insurer of the goods intrusted to him for carriage. It is settled by all the authorities that the carrier is an insurer of the passenger's baggage; and, where the rule has not been changed by statute, we have this anomalous condition, that, when a passenger and his baggage are injured in the same wreck, the railroad is liable for damages done to the baggage irrespective of its negligence, but is not liable to the injured passenger without proof of negligence. The Nebraska statute does away with this anomaly, and puts the passenger and his baggage on very much the same footing. And why not? There would seem to be more reason for protecting the passenger than his baggage. When a passenger, without any fault on his part, is injured, why should not the railroad company compensate him therefor? Grant that the company was innocent of any negligence or intention to injure him, the fact remains that it did injure him; and, where one of two innocent persons must suffer a loss, why should not the one who inflicted the injury be required to bear the burden? The learned counsel for the defendant in error contends—citing some cases to support the contention which we have not examined—that the Nebraska statute is simply a re-enactment of the early common law on the subject of the carrier's liability to the passenger, which, he maintains, was gradually changed by judicial decision, and he remarks that "it would, indeed, be singular if the courts, having legislated a new rule into the law on this subject, should deny to the real lawmakers the right to change the rule back to what it was in the beginning." We have not found it necessary to inquire into the soundness of the counsel's contention, and we

Chicago, etc., Ry. Co. v. Zernecke

express no opinion upon it; for without reference to the common law, ancient or modern, it is quite clear that a common carrier of passengers, who conducts its business by the powerful and dangerous agency of a railroad, the right to use which is derived from the legislature of the state, may be required by the state to compensate its passengers for injuries it inflicts upon them independent of any question of its own negligence. Such a statute cannot be distinguished in principle from those we have referred to imposing an absolute liability for the loss of property by fire, or from the common-law rule which imposes an absolute liability for loss of the passenger's baggage. Both upon principle and authority, the Nebraska statute is a valid enactment.

Exceptions were taken to some questions propounded to a witness. We think the question itself was proper, but, whether so or not, the witness did not answer it. There are no other exceptions having any merit or requiring special notice. The judgment of the circuit court is affirmed.

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CHICAGO, R. I. & P. Ry. Co.

v.

ZERNECKE.

*(Supreme Court of Nebraska, March 7, 1900.)*

**Injuries to Passengers—Right of Action—Construction of Statute.**—By section 3, art. 1, c. 72, Comp. St., a right of action is given to a person for all injuries sustained while a passenger of a railroad company, except where the injury was occasioned by his own criminal negligence, or by his violation of some express rule or regulation of the carrier, actually brought to his notice.

**Same—Derailment of Train—Presumption of Negligence.\***—In an action for injuries sustained by derailment of a train on which plaintiff was a passenger, the statute creates a presumption that the accident was caused by the negligence of the carrier, or by its wrongful act, neglect, or default.

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\*See generally *McCofferty v. Pennsylvania R. Co. (Penn.)*, 16 Am. & Eng. R. Cas., N. S., 122, and *note*, 126, *et seq.*

Chicago, etc., Ry. Co. v. Zernecke

**Same—Constitutionality of Statute Creating Liability in Absence of Negligence—Police Power.\***—Said section 3, art. 1, c. 72, Comp. St., making carriers liable, in the absence of negligence, for injuries to passengers, is within the police power of the state.

**Statutes.**—Chapter 21, Comp. St., is not amendatory of section 3, art. 1, c. 72, Comp. St., nor do the two acts in any wise conflict, one with the other.

**Construction of "Lord Campbell's Act."**—Under chapter 21, Comp. St., known as "Lord Campbell's Act," a right of action is given the legal representative of one who has died in consequence of injuries sustained while being transported by a railroad company, where the injured party could have maintained an action had he survived.

**Construction of Statutes.**—All statutes *in pari materia* must be taken together, and construed as if they were one enactment, and, if possible, effect given to every provision.

**Constitutionality of Statutes.**—Section 3, art. 1, c. 72, Comp. St., is not inimical to the fourteenth amendment of the constitution of the United States, or to section 3, art. 1, of the constitution of this state, as tending to deprive railroad companies of their property without due process of law.

**Instructions.**—Instructions should be construed together, and if, when so considered, they state the law correctly, applicable to issues and evidence, they will be sustained.

**Same.**—Instructions in this case examined, and *held* free from reversible error.

(Syllabus by the Court.)

**ERROR** by defendant to Thayer county district court.  
*Affirmed.*

*W. F. Evans, L. W. Billingsley, and R. J. Greene (M. A. Low, of counsel), for plaintiff in error.*

*Stewart & Munger, for defendant in error.*

**NORVAL, C. J.** In 1894, Ernest H. Zernecke was killed in a train wreck while a passenger of the Chicago, Rock Island & Pacific Railway Company, and his wife, as administratrix of his estate, brought this action to recover damages therefor for the benefit of herself and minor children. The train was wrecked by the criminal act of a third person, without fault on the part of the railway company. On the trial a verdict was rendered in favor of plaintiff, and judgment was entered thereon, from which the railway company comes to this court on error.

Case Stated.

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\*See Clark *et al. v. Russell*, *ante*, 68.

Chicago, etc., Ry. Co. v. Zernecke

On the trial the following instruction was given by the court, to which the defendant took exception: "The jury are instructed that if you find from the evidence that Ernest H. Zernecke was a passenger being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Zernecke, and that plaintiff is his administratrix, and she and her children had a pecuniary interest in his life, and suffered loss by his death, then you should find for the plaintiff." Section 3, art. 1, c. 72, Comp.

Injuries to Passengers—Right of Action—Construction of Statute.

St., declares that "every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The instruction quoted is within the provision of said section, aside from the omission to state exceptions, contained in the statute that the defendant was not liable for injury resulting from the criminal negligence of the person injured, or from his violation of some expressed rule or regulation of the company, actually brought to the notice of the injured passenger. There is an entire absence of any evidence in the record before us tending to bring the case within either of the exceptions contained in said section 3; therefore the instruction was pertinent and proper, if said legislation is constitutional, and applicable to the case at bar.

Same—Derailment of Train—Presumption of Negligence.

The constitutionality of said section has been assumed by this court in numerous cases. *Chollette v. Railroad Co.*, 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135; *Railroad Co. v. Chollette*, 33 Neb. 143, 49 N. W. 1114; *Railroad Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Railroad Co. v. Hague*, 48 Neb. 97, 66 N. W. 1000; *Same v. Hyatt*, 48 Neb.

Same—Constitutionality of Statute Creating Liability in Absence of Negligence—Police Power.

Chicago, etc., Ry. Co. v. Zernecke

161, 67 N. W. 8; Railroad Co. v. French, 48 Neb. 638, 67 N. W. 472. And the validity of said statute has been expressly decided in Railroad Co. v. Porter, 38 Neb. 226, 56 N. W. 808; Railroad Co. v. Chollette, 41 Neb. 578, 59 N. W. 921; Railway Co v. Young (Neb.), 79 N. W. 556. The legislation is justifiable under the police power of the state, so it has been held. It was enacted to make railroad companies insurers of the safe transportation of their passengers as they were of baggage and freight, and no good reason is suggested why a railroad company should be released from liability for injuries received by a passenger while being transported over its line, while the corporation must respond for any damages to his baggage or freight. It is argued by counsel for defendant below that said section 3 is not applicable to cases of injuries causing the death of a passenger, the contention being that section 1, c. 21, Comp. St., is the law governing this class of actions, and that under the provisions of said last-named statute the defendant should have been permitted to prove that the death of plaintiff's husband was not caused by any act of negligence on the part of the railway company, and that the jury should have been instructed that, before there could be a recovery, it was necessary to establish the fact that defendant company had been negligent in the premises. It is further argued that, if it be held that said first-named statute is the law governing this class of cases, then Statutes. the same has been repealed by said chapter 21, which is a later enactment, and that the two are in conflict. If the two statutes are in conflict, the argument is unanswerable. But it is believed that the two statutes do not in any wise conflict one with the other. Said section 3, as already stated, makes a railroad company an absolute insurer of the safety of its passenger, save in cases falling within one or the other of the two exceptions mentioned in the statute. It gives or creates a right of action in favor of the injured passenger, and, when it is established that a person is injured while a passenger of a railroad company, a conclusive presumption of



Chicago, etc., Ry. Co. v. Zernecke

negligence arises in every case except where it is disclosed that the injury was one caused by his own criminal negligence, or by his violation of some rule of the company brought to his actual notice. On the other hand, chapter 21, Comp. St., known as "Lord Campbell's Act," creates a right of action in favor of the personal representation of the deceased where none existed before. It is very broad in its

Construction of  
"Lord Campbell's  
Act."

terms, being applicable to all acts of negligence, whether on the part of a railway company or others. Under said section 3, art. 1, c. 72, a litigant establishes an act of negligence or a default on the part of defendant railway company when the fact is disclosed that he was a passenger of such railway company, and while such passenger was injured. In other words, a conclusive presumption of negligence arises where the case does not fall within the exceptions of the law, and he has his right of action. Prior to the adoption of said section 3 in 1867, he would have had to affirmatively establish some act of negligence on the part of the railway company to entitle him to recover for injuries received while a passenger. From the time this section was passed until said chapter 21 was adopted, in 1873, no right of action existed for negligence resulting in the death of a person. But said chapter in broad terms gives a right of action for the death of a person caused by the wrongful act, neglect, or default of another, if the same is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof. Now, it is indisputable that, if Zernecke had been injured merely, and not killed, he would have recovered against the railway company under said section 3, art. 1, c. 72, and that thereunder said injuries would have been deemed to have been caused by the wrongful acts, neglect, or default of the said railway company in failing to carry such passenger safely. Hence this case falls within the scope of said chapter 21, and the fact of negligence or the defendant's wrongful acts or default is established when the evidence discloses the facts specified in said section

Chicago, etc., Ry. Co. v. Zernecke

3 of chapter 72. The two statutes are not in conflict, for the reason that one creates a liability in favor of the passenger himself, and obviates the necessity of proving the negligence of the carrier, while the other statute gives a right of action (where none existed before) to the personal representatives of a deceased person in all cases where such person could have recovered damages for his injury if death had not ensued. *Ean v. Railway Co.*, 95 Wis. 69, 69 N. W. 997; *Philo v. Railroad Co.*, 33 Iowa, 47. The rule is that all statutes *in pari materia* must be taken together, and construed as if they were one enactment. *Hendrix*

*v. Rieman*, 6 Neb. 516; *State v. Babcock*, 21 Construction of Statutes. Neb. 599, 33 N. W. 247; *People v. Weston*, 3

Neb. 322. Statutes should be so construed, if possible, as to give effect to every provision; and an act should not be placed in antagonism with another act unless such was the manifest purpose and object of the legislature. *McCann v. McLennan*, 2 Neb. 286; *Railroad Co. v. Webb*, 18 Neb. 215, 24 N. W. 706; *State v. Babcock*, 21 Neb. 599, 33 N. W. 247. Tested by these principles, the conclusion is irresistible that said section 3, art. 1, c. 72, Comp. St., was not amended by chapter 21 of said statutes, known as "Lord Campbell's Act."

It is further contended that section 3, c. 72, is in conflict with the fourteenth amendment of the constitution of the United States, and with section 3, art. 1, of the constitution of this state, as tending to deprive railroad companies of their property without due process Constitutionality of Statute. of law. This court has decided to the contrary in *Railway Co. v. Young*, 79 N. W. 556, and cases therein cited; and we see no reason for departing from the law as therein laid down. See *Clark v. Russell*, 38 C. C. A. 541, 97 Fed. 900; *Railroad Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Railroad Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; *Railroad Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746.

Chicago, etc., Ry. Co. v. Zernecke

The following instruction was given by the court: "If, under the evidence and instructions of the court, the jury find for the plaintiff, then, in assessing the damages which the plaintiff is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the wife and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, business capacity, experience, habits, health, bodily and mental qualifications, during what probably would have been his lifetime if he had not been killed, so far as these matters have been shown by the testimony; and you may also consider the value his services might have been in the superintendence and attention to and care of his family, and the education of his children; but the amount you can allow cannot exceed the sum of \$5,000." It is contended that in the portion of the instruction which directed the jury that, in considering the question of what the value of the services of deceased might have been in the superintendence and care of his family and the education of his children, etc., the jury were not required to confine themselves to the evidence, but were "turned loose," without anything to guide them in ascertaining the value thereof. We do not think so. In a general instruction they were told that, in case they found for the plaintiff, it must be for pecuniary damages alone which they must find from the evidence the plaintiff and her children had suffered; and no doubt the jury considered the two instructions together in passing upon the element of damage. There was evidence on which to base the instruction, and we do not doubt that, under the instructions, the jury gave it only its due weight. It is further urged that the court in this clause of the instruction should have used the word "probably," instead of the word "might." We have no doubt that the former word is the better of the two, in that connection, but jurors are not given to nice distinctions in words, and we cannot imagine that they were in any wise misled by the use

Texas & P. Ry. Co. v. Humble

of the one word rather than the other. We have carefully examined all the arguments adduced in the briefs of counsel, but fail to find any error reversible in the record; wherefore the judgment of the lower court is affirmed. Same.

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TEXAS & P. Ry. Co.

v.

HUMBLE.

(Circuit Court of Appeals, Eighth Circuit, Nov. 6, 1899.)

**Personal Injuries—Married Women as Plaintiffs in Federal Courts—State Statute.**—The statute of Arkansas providing that a married woman may maintain a suit in her own name for any injury to her person, etc., is applicable to such suits in federal courts as well as to those brought in the courts of the state.

**Same—Federal Courts—Absence of Witness—Continuance—Admissions—State Statute.**—In such an action in a federal court, advantage may be taken of a statute of the state by admitting that an absent witness would testify as claimed, and thus render such absence no ground for continuance.

**Same—Same—Same—Same—Judicial Discretion.**—Error cannot be assigned on appeal or writ of error on account of the discretionary action of the trial judge in refusing a continuance.

**Instructions.**—A requested instruction not warranted by the evidence is properly refused.

**Same—Injury to Passenger—Defective Chair in Waiting Room—Question for Jury.\***—In an action for injuries to a passenger at a station, a requested instruction was properly refused, as it assumed a material fact not appearing from the evidence, and ignored an obligation which rested on the defendant railroad to remove a defective chair from its waiting room or to cause it to be repaired when it had notice of its defect and the mischievous use that was being made of it by boys.

**Same—Damages—Lex Loci.**—In such an action, the fact that plaintiff's husband is living in another state, where damages recov-

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\*See *Wilkes v. Western & A. R. Co. (Ga.)*, 16 Am. & Eng. R. Cas., N. S., 826.

## Texas &amp; P. Ry. Co. v. Humble

ered in an action for a wife's personal injuries are the community property of the husband and wife, cannot be material, as the rules in vogue in another jurisdiction ought not to be applied where the tort was committed within the state whose courts are asked to redress the the alleged wrong.

**Same—Damages Recoverable by Married Woman.**—A married woman authorized by statute to enjoy the fruits of her own labor without participation by the husband is entitled to recover for a personal injury which diminishes her capacity to labor.

**ERROR** by plaintiff to the circuit court of the United States for the western district of Arkansas. *Reversed.*

Emma Humble, the defendant in error, brought this action against the Texas & Pacific Railway Company, the plaintiff in error, to recover compensation for certain personal injuries which she sustained in the defendant's waiting room or station at Texarkana, Ark., on April 9, 1898, while she was waiting to become a passenger on one of the defendant's trains. She attempted to take a seat in said waiting room in one of the chairs that had been provided for the use of passengers, but, owing to a defect in the chair, the bottom gave way, causing her to fall through the chair, and to become wedged therein until she was extricated. As a result of the accident, the plaintiff sustained serious internal injuries, which, as she claimed, and as the evidence tended to show, had permanently impaired her health and strength, and lessened her capacity to labor, besides compelling her to wear a truss to counteract the effects of a rupture. A judgment was recovered by the plaintiff in the lower court, which has been brought before this court for review on a writ of error.

*F. H. Prendergast* (*T. J. Freeman*, on the brief), for plaintiff in error.

*Oscar D. Scott* (*Paul Jones* and *S. S. Solinsky*, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

## Texas &amp; P. Ry. Co. v. Humble

At the commencement of the trial in the lower court, the defendant company asked that court to require the plaintiff's husband to be made a party plaintiff, assigning as a reason for such motion that, if the plaintiff could recover for the injuries complained of, then her husband could also recover, and that it was desirable that he should be joined, to the end that all claims might be settled in one suit. The motion was denied, and an exception was saved. We perceive no merit whatever in this exception, as the suit was by the wife to recover for certain personal injuries which she had sustained, and as the laws of Arkansas, where the suit was brought, expressly provide (Sand. & H. Dig. Ark. § 5641) that a married woman "may maintain an action in her own name \* \* \* for any injury to her person, character, or property." This statute is applicable to suits commenced in the federal courts as well as to suits brought in the courts of the state. *Association v. Smith*, 1 U. S. App. 270, 275, 4 C. C. A. 8, 25 Fed. 141. Besides, as this action was originally instituted in a state court and was removed therefrom to the federal court at the instance of the defendant, it could not by such removal deprive the plaintiff of the right secured to her by local laws to prosecute the suit in her own name for her own benefit. Rev. St. U. S. § 721.

Personal Injuries  
—Married Women  
as Plaintiffs in  
Federal Courts—  
State Statute.

When the case was called for trial, the defendant company, in addition to the above motion, also applied for a continuance; but as the plaintiff's attorney took advantage of the provisions of the Arkansas statute (Sand. & H. Dig. Ark. § 5797), and admitted that the absent witness, if present, would testify to the facts stated in the defendant's application for a continuance, the motion was overruled. There was no error in such action. The trial court properly exercised its discretionary power. Besides, error cannot be assigned on appeal or writ of error on account of such discretionary action by the trial judge, as this court and other federal courts have repeatedly decided. *Davis v.*

Same—Federal  
Courts—Absence  
of Witness—Con-  
tinuance—Admis-  
sions—State  
Statute.

Same—Same—  
Same—Same—  
Judicial Discre-  
tion.

## Texas &amp; P. Ry. Co. v. Humble

Patrick, 12 U. S. App. 629, 635, 6 C. C. A. 632, 57 Fed. 909; Manufacturing Co. v. Hess (C. C. A.) 98 Fed. —.

Complaint is next made of the refusal of the trial court to give two instructions which were asked by the defendant. These instructions were as follows:

"(1) In this case the plaintiff cannot recover, because the evidence shows that the acts of some malicious boys, for whose acts defendant is not liable, caused the plaintiff to sit in a seat that had not been prepared for her, nor for other passengers, and thereby to receive the injuries she did."

"(5) If you believe the seat in question was out of order by reason of the perforated bottom being out or hanging down, and that its condition was apparent to any person about to sit down on it, and you further believe that some boys, not in the employ of defendant, and without defendant's knowledge or consent, went, a short time before the accident, and fixed the perforated bottom into the frame of the seat so that it would appear to be in good condition, and this was done for the purpose of deceiving persons and making them believe the seat was in good condition, and the plaintiff was deceived by its then appearance, and induced to sit in the seat by reason of being thus deceived, then the defendant would not be liable."

The first of these instructions was properly denied, because it assumed that an act committed by some mischievous boys was the proximate cause of the injury, without submitting

Instructions. that issue to the arbitrament of the jury. The

only evidence contained in the record which tended to afford a basis for the foregoing instructions was the testimony of one witness to the effect that the chair in question had been out of repair for some time, and that certain small boys on some previous occasions had fixed the seat so as to make it appear all right, and then induced their unwary playmates to sit down in it and receive a fall. There was no evidence, so far as we are able to discover, which would have warranted the court in instructing the jury as a matter of law, as it was asked to do in the first of the above

Texas & P. Ry. Co. v. Humble

instructions, that the fall of which the plaintiff complained was induced by the malicious act of a stranger, rather than by the neglect of the defendant company. There was abundant evidence to the effect that the chair had been out of repair in the waiting room for a long time; that it was in such a condition as to prove a trap for the unwary; and that the station master had been notified of its condition, and had taken no steps to remove it or to have it repaired. In view of this testimony, it is manifest that the first instruction should not have been given.

The other instruction was also erroneous, in that it assumed that there was some evidence before the jury tending to show that the bottom of the chair was out or hanging down, and that the defect therein was obvious to every one

when the plaintiff attempted to sit down. We find no evidence to that effect, but, on the contrary, we do find testimony which tended to

Same—Injury to  
Passenger—  
Defective Chair  
in Waiting Room  
—Question for  
Jury.

show that it appeared to be in a suitable condition at the time of the accident. Besides, the instruction utterly ignored an obligation which rested on the defendant company either to remove the chair from its waiting room or cause it to be repaired when it had notice of the defect therein and the tricks which boys were in the habit of playing on each other. It was the province of the jury to decide whether the defendant was not guilty of some negligence, directly contributing to the injury which the plaintiff sustained, in permitting the chair to remain for a long time in its waiting room with knowledge of its condition and the use that was being made of it by boys to deceive unsuspecting persons. In view of the testimony in the case and the form of the instruction, it was clearly erroneous and properly refused.

The next and most important question in the case is whether the trial court erred in instructing the jury that, if the finding was for the plaintiff, they might, in assessing the plaintiff's damages, "take into consideration her age and earning capacity before and after the injury was received, as shown by the proofs." This

Same—Damages  
—Jury Loc.



## Texas &amp; P. Ry. Co. v. Humble

direction is said to have been wrong, because the plaintiff was thereby allowed to recover for a loss of her earning capacity, which was an injury, as it is claimed, on account of which the husband alone is entitled to demand compensation. It is further said that the husband was especially entitled to recover for the loss of the wife's earning capacity in the case at bar, because he had taken up his abode in the state of Louisiana shortly prior to the accident, under whose laws a claim for damages for an injury to the wife is community property, which must be sued for by the husband and the wife. The plaintiff in the case at bar, as the evidence shows, had resided in the state of Arkansas, where she was hurt, for more than 10 years prior to the injury, but she was on her way to Shreveport, La., to join her husband, when the injury was sustained. Now, assuming it to be true, although the fact was not pleaded, that the plaintiff's husband had taken up his abode in the state of Louisiana shortly before the accident, and that the laws of that state make the damages claimed community property, and entitle the husband to join in a suit for their recovery in that state, the inquiry arises whether by virtue of these facts the plaintiff's rights, when she sued in the state of Arkansas for an injury there sustained, differed in any respect from those of a married woman domiciled in that state. We think that this question should be answered in the negative. The laws of Louisiana cannot be allowed to have any extraterritorial effect in a case of this character. It was competent for the legislature of the state of Arkansas to determine, as it has done, by whom a suit may be brought for personal injuries sustained by a married woman, and the legislative direction on that subject must be observed in all suits which are commenced in that state. It was equally competent for the legislature to enlarge the rights of married women so as to work a change in the kind and amount of damages recoverable by them on account of personal injuries sustained within the state; and such laws, when enacted, necessarily inured to the benefit of every married woman who subsequently sued in the courts of the

## Texas &amp; P. Ry. Co. v. Humble

state for personal injuries there sustained. It sometimes happens that the measure of damages for the same wrong is not the same in one jurisdiction as in another; but it has never been supposed that the courts of one state, when appealed to for relief by a nonresident, are bound to apply the rule for the admeasurement of damages which prevails in the nonresident's place of abode if it differs from their own. It is clear that the rule in vogue in another jurisdiction ought not to be applied when, as in the case at bar, the tort was committed, not in the foreign jurisdiction, but within the state whose courts are asked to afford redress for the alleged wrong. In short, the laws of a state, whether statutory or the result of judicial decision thereon, should have a uniform operation throughout the state, whether the protection thereof is sought by a citizen or a stranger; and this principle should be enforced especially in actions to obtain redress for an injury to the person, character, or reputation of the plaintiff committed within the state. The same damages should be awarded for the wrong, whether the action is by a citizen of the state or a nonresident, since, by appealing for relief in an action that is transitory and may be brought anywhere, the plaintiff necessarily elects to take that measure of relief which the chosen forum affords to its own citizens, and becomes subject alike to the advantages and disadvantages which ensue from his choice of a forum.

It results from what has been said that the substantial question in the case is whether, under the laws of Arkansas, a married woman, when suing for a personal injury there sustained, is entitled to recover as a part of her damages for a loss of earning capacity incident to the injury. The statutes of that state provide, as heretofore shown, that she may maintain a suit in her own name for an injury to her person, character, or property. They further provide, in substance (Sand. & H. Dig. Ark. §§ 4940, 4945), that both the personal and real property of the wife, acquired either

Same—Damages  
Recoverable by  
Married Women.

## Texas &amp; P. Ry. Co. v. Humble

before or after her marriage, shall be and remain her separate estate and property, and may be disposed of as if she were a *feme sole*. They also declare that property of all kinds which comes to a married woman by gift, bequest, or descent, and that which she acquires by her trade, business, labor, or services carried on or performed on her sole or separate account, and the rents, issues, and proceeds of all such property, shall remain her own, and may be used, invested, and disposed of by her as she deems best, free from the control of her husband and without liability for his debts. Herein is found a clear authority, by inference, for a married woman to engage in trade or in any business which she may elect to pursue, the same as a *feme sole*, and to hold whatever property she may thus acquire as her own, free from the control or interference of her husband. The question does not appear to have been decided by the local courts whether, in view of the aforesaid statute, a married woman suing for a personal injury in the state of Arkansas may lay claim to compensation for a loss of earning capacity; but it seems to us to follow logically from the authority given to her to carry on any business as a *feme sole*, and to appropriate the proceeds of her labor, that a loss of earning capacity incident to a personal injury is a loss for which a married woman is entitled to demand reasonable compensation from the wrongdoer. As she is entitled to enjoy the fruits of her own labor without participation by the husband, a wrongful or negligent act which lessens her capacity to labor inflicts a loss on account of which she should be entitled to recover, as well as for the pain and suffering which was occasioned by the injury. The precise question here involved has recently undergone judicial consideration in the state of Massachusetts, whose laws concerning the rights of married women are substantially the same as in the state of Arkansas. *Harmon v. Railroad Co.*, 165 Mass. 100, 104, 42 N. E. 505. It was there held, in substance, that the right conferred on married women by the statutes of that state to engage in trade and business on their own

## Texas &amp; P. Ry. Co. v. Humble

account, and to enjoy the fruits of their own labor, is inconsistent with the theory that a married woman's capacity to labor belongs exclusively to her husband, and, as a corollary from that proposition, it was decided that, in an action by a wife for personal injuries, the jury were entitled to consider to what extent, if any, the injury sustained had impaired her capacity to labor. The supreme court of Montana appears to have adopted a similar view in *Hamilton v. Railway Co.*, 17 Mont. 334, 42 Pac. 860, and 43 Pac. 713. See, also, *Jordon v. Railroad Co.*, 138 Mass. 425. Moreover, in the case at bar, there was evidence which showed that before the plaintiff was injured she had been engaged for several years in running a hotel and boarding house, which occupation was pursued as her sole and separate business. There was further testimony to the effect that she had discontinued the business aforesaid shortly prior to the accident, owing to a temporary illness, and had not been engaged in any business since then, owing to her enfeebled condition, which had incapacitated her from doing any work except such as could be done while she was sitting down. In view of what has been said, we are of opinion that no error was committed by the trial judge in permitting the jury to consider the plaintiff's earning capacity before and after the accident, for the purpose of arriving at a just assessment of the damages. She was entitled to some allowance on this account, if the proof showed that her capacity to labor had been impaired by the injuries which she had received, since it cannot be maintained, under such laws as prevail in the state of Arkansas, that a wife's capacity to labor is the exclusive property of her husband. It is certain that no such doctrine ought to be tolerated in a case where it appears that previous to the injury the wife had carried on business in her own name and for her own benefit. Finding no error in the record, the judgment below is hereby affirmed.

SANBORN, Circuit Judge (dissenting). The question presented in this case has been the subject of much discussion

## Texas &amp; P. Ry. Co. v. Humble

and of conflicting decisions, but, under the statutes of Arkansas, the logical result seems to me to be that the husband may, and the wife cannot, recover for the loss of the wife's services, or for her diminished capacity to labor, which is the same thing. The husband is still the head of the family in Arkansas. He is liable for the support of the family, and lawfully entitled to services from his wife in that regard, and he necessarily loses through the impairment of her capacity to labor. The authorities cited in the majority opinion seem to rest on a supposed distinction between loss of service and diminution of the capacity to labor, and to hold that the husband may recover for the former and the wife for the latter (*Hamilton v. Railway Co.*, 17 Mont. 334, 42 Pac. 860, and 43 Pac. 713; *Harmon v. Railroad Co.* [Mass.], 42 N.E. 505; *Jordan v. Railroad Co.*, 138 Mass. 425), but there is and can be no practical distinction between them. The loss of service is the measure of the impairment of capacity and the proof of it, and to permit the husband to recover for the loss of service, and the wife for impairment of capacity to render it, is to allow two recoveries for the same damages. We have already held that, under the Arkansas statutes, the husband may recover for the destruction of the wife's capacity to labor and the loss of her service resulting therefrom. *Railway Co. v. Henson*, 7 C. C. A. 349, 58 Fed. 531, 533. To my mind, this was to hold that the wife could not recover for them, and I think that this is the true rule, and that it is in accord with the weight of authority. *Railway Co. v. Stone* (Kan. Sup.) 37 Pac. 1015; *Blaechinska v. Howard Mission* (N. Y.), 29 N. E. 755, 15 L. R. A. 215; *Filer v. Railroad Co.*, 49 N. Y. 47, 3 Am. & Eng. R. Cas. 466; *Tuttle v. Railroad Co.*, 42 Iowa, 518, 521. My conclusion is that her earning capacity was not a proper element of the damages of the married woman in this case, and that the judgment ought to be reversed for that reason.

Trumbull v. Erickson

TRUMBULL

v.

ERICKSON.

(Circuit Court of Appeals, Eighth Circuit, Nov. 13, 1899.)

**Yielding Seat to Infirm Passenger—Contributory Negligence.\***—It cannot be held, as a matter of law, that a passenger surrendering *his seat* to one less able to stand than himself, contributes to an injury caused by the carrier's negligence, but which he would not have received had he remained in his seat.

**Standing on Platform—Contributory Negligence.†**—A passenger is not guilty of contributory negligence in standing upon the platform of a car in motion, when compelled to do so by the crowded condition of the car.

**Intoxication—Contributory Negligence.‡**—The mere fact that a person, when injured, was intoxicated, is not, in itself, evidence of contributory negligence.

**Carriers of Passengers—Due Care.§**—Steam railroad companies, as carriers of passengers, must exercise the greatest possible care and diligence.

**Contributory Negligence.||**—Contributory negligence is always material and substantial, and the trial court's instruction on this subject was not erroneous nor misleading.

**Instructions.**—The trial court properly refused to give undue prominence to isolated facts, by singling them out and making them the subject of special instructions.

**Same.**—Where the charge covers the entire case, and submits it properly to the jury, the court may refuse to instruct further.

**ERROR** by defendant to the circuit court of the United States for the District of Colorado. *Affirmed.*

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\*See note at end of case.

†See *Ward v. Chicago, etc., R. Co. (Wis.)*, 14 Am. & Eng. R. Cas., N. S., 322, and *notes*, 332 *et seq.*

‡See *note*, 13 Am. & Eng. R. Cas., N. S., 689.

§See *Sanders v. Southern Ry. Co. (Ga.)*, 14 Am. & Eng. R. Cas., N. S., 281, and *note*, 289.

||See *note*, 10 Am. & Eng. R. Cas., N. S., 385 *et seq.*

## Trumbull v. Erickson

This writ of error was sued out to reverse a judgment recovered by John Erickson, the defendant in error, and plaintiff below, against Frank Trumbull, as receiver of the Union Pacific, Denver & Gulf Railway Com-

Case Stated.

pany, the plaintiff in error, and defendant below. The plaintiff was a passenger on one of the defendant's trains from Denver to Ft. Collins. It was at the close of the "Festival of Mountain and Plain," and all outgoing trains were very much crowded. The defendant had full knowledge of the large number of passengers his trains would be required to carry, having himself advertised the carnival extensively, and, as an inducement to persons desiring to visit Denver on that occasion to take his road, assured them that ample accommodations would be provided for all passengers. The plaintiff obtained a seat in a coach, but when the car became crowded, and the seats were all taken, he surrendered his seat to two old and infirm women. There being no other seat in that car, he stood in the aisle, which was crowded with passengers, who were alternately pushing forward and backward; and the plaintiff was pushed out on the platform, where numerous other passengers were also compelled to stand. While thus standing on the platform, the train, in making a curve, jolted all the passengers with more or less violence; and the plaintiff was thrown or fell off the car, and was seriously injured. The answer denied negligence, and alleged the plaintiff was guilty of contributory negligence. The jury found the issues in favor of the plaintiff.

*Elmer E. Whitted*, for plaintiff in error.

*Henry J. O'Bryan* (*J. Grattan O'Bryan*, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is alleged that the court erred in refusing to give the jury this instruction:

Trumbull v. Erickson

"You are instructed that if you believe from the evidence that the plaintiff, on leaving Denver, had a seat in one of the coaches, but of his own accord gave it up to some one else, and went upon the platform of the car, either in search of another seat, or for the purpose of riding there, he cannot complain in this action that the defendant did not furnish seats for all of the passengers. The defendant, under these circumstances, must be held to have performed his whole duty to this plaintiff, and is not responsible for any injury which the plaintiff received by reason of having a seat, or by reason of his not having a seat; and you are instructed that the verdict must be for the defendant."

Yielding Seat to  
Infirm Passenger  
—Contributory  
Negligence

On that point the court, in its charge in chief, instructed the jury as follows:

"The court cannot say, as a matter of law, that a passenger surrendering his seat to one less able to stand than himself should be held guilty of contributory negligence upon that ground. The mere fact of surrendering his seat (as the testimony in this case, it seems to me, shows) to a couple of ladies who were old and infirm, would not, of itself, constitute negligence and relieve the defendant of liability. As I have explained, the burden of proof is upon the plaintiff to establish the defendant's negligence, and that his injuries resulted therefrom, by a fair preponderance of the evidence."

The charge the court gave meets our fullest approval. It properly left it to the jury to determine whether, under the peculiar circumstances of the case, it was an act of negligence on the part of the plaintiff to surrender his seat. The defendant, in effect, asked the court to declare, as a matter of law, that, when an able-bodied passenger in a crowded car surrenders his seat to an infirm old person, he is guilty of an act of negligence. It is a matter of every-day occurrence for passengers on crowded street cars to surrender their seats to women, and to men as well, who are old, crippled, and infirm; and this practice obtains under like circumstances on passenger cars on railroads, also. While the law does not make it



## Trumbull v. Erickson

obligatory upon a passenger to do this, the consensus of opinion in this country does; and one failing to extend this courtesy, under the circumstances that existed in this case, would justly subject himself to public scorn and censure. It is an act of courtesy which is practiced and approved by all men of ordinary social instincts, and only a corporation, which is a creation of man, and therefore has neither soul nor conscience nor social instincts, nor any principles outside of its coffers, would seek to have such a polite and gracious act declared one of culpable negligence. "It cannot be held, as a matter of law, that a passenger surrendering his seat to one less able to stand than himself, contributes to an injury caused by the carrier's negligence, but which would not have been received had he remained in his seat." *Lehr v. Railroad Co.*, 118 N. Y. 556, 23 N. E. 889.

Nor was the plaintiff guilty of contributory negligence in standing upon the platform, under the circumstances. The receiver had ample notice that there would be an extraordinary number of passengers on this occasion.

**Standing on Platform—Contributory Negligence.**

He had invited them by alluring posters which assured them they would receive first-class accommodations, which, of course, included seats. All passengers who had tickets that entitled them to go by that train were entitled to seats. The plaintiff held such a ticket,—the return coupon of a round-trip ticket. Under these circumstances, it was negligence in the receiver not to furnish reasonable seating accommodations for his passengers; and the plaintiff was not guilty of contributory negligence by standing upon the platform, with others, when the seats and aisle were full. "The passenger is not guilty of contributory negligence by standing upon the platform while the car is in motion, if there be no vacant seat inside the car. Room inside the cars for the sufficient accommodation of the passengers means a seat for each passenger, not standing room in the passageway." *Willis v. Railroad Co.*, 34 N. Y. 670—681.

Trumbull v. Erickson

There was conflicting evidence upon the question whether the plaintiff was intoxicated at the time, and upon that subject the court told the jury:

Intoxication—  
Contributory  
Negligence.

"If, from the evidence, you should find that the plaintiff was intoxicated at the time of the injury, this, of itself, does not constitute a defense to the plaintiff's right of recovery, unless you should further find that such intoxication was the proximate cause of the injury suffered by the plaintiff. If his intoxicated condition was the proximate cause of the injury, then he could not recover. The fact of plaintiff's intoxication, if you should find that he was intoxicated at the time of the injury, is, in itself, as a matter of law, not such negligence as would bar a recovery. The mere fact of intoxication will not establish want of ordinary care; nor is it, of itself, more conclusive evidence of his negligence, unless you further find that the intoxication of the plaintiff was the cause, and contributed to the injury. And if it was not the immediate cause, or did not contribute to the injury, it is of no importance; and you should disregard all such testimony, in case you should find that it did not contribute to, and was not the proximate or immediate cause of, the injury."

The charge correctly expressed the law on the subject. The authorities are uniform that the mere fact that a person, when injured, was intoxicated, is not, in itself, evidence of contributory negligence, but that it is a circumstance to be considered in determining whether his intoxication contributed to his injury; if it did, he cannot recover; if it did not, it will not excuse the defendant's negligence. *Ward v. Railway Co.*, 85 Wis. 601, 55 N. W. 771; *Keane v. Railroad Co.*, 61 Md. 154; *Ditchett v. Railroad Co.*, 5 Hun, 165; *Railway Co. v. Reason*, 61 Tex. 613.

Serious exception is taken to the following paragraph of the charge of the court:

"As to the liability of the defendant, the rule of law is this: That a common carrier, a railroad (in this case, the receiver),

## Trumbull v. Erickson

is bound to exercise the highest degree of care and skill which a cautious or prudent man would exercise under the circumstances. If it fails to exercise (in this case, if the receiver fails to exercise) that degree of care and skill, and an injury results therefrom, without the party who is injured contributing materially or substantially thereto, then the defendant must respond in damages. It is, also, on the other hand, the duty of a passenger in a train to exercise that ordinary care and prudence which a prudent man would himself observe to save himself from injury. The degree of care on the part of the railroad company (in this case, the receiver) is the highest degree of care and skill. The degree of care on the part of a passenger is ordinary care and skill. Hence, in this case, it is your duty to look carefully at all of the facts and circumstances surrounding the case, to ascertain (1) whether the defendant was guilty of negligence; and (2) whether, if so, the passenger injured (the plaintiff here) did himself substantially or directly contribute thereto, because, if he did contribute thereto, the law does not divide between the respective parties the amount which has been caused,—the amount, I mean, in money or damages caused thereby. There is no rule by which such a division could be had. Therefore the law states distinctly that if a party has himself contributed substantially or directly to the injury, of which he complains, there can be no recovery on his part."

The contention is that this instruction fixed the standard of care, which a railway company is required to exercise in the transportation of passengers, too high. As far back as 1852 the supreme court of the United States, in *Railroad Co. v. Derby*, 14 How. 486, 14 L. Ed. 509, declared that:

"When carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence."

This has ever since been recognized as the correct rule of law as to the degree of care and diligence a railroad company

Carriers of Pas-  
sengers—Due  
Care.

## Trumbull v. Erickson

must exercise in the transportation of passengers. The rule is uniformly applied to passenger trains. *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898. There is nothing in this case that exempts the defendant from the operation of the rule. He had invited the crowd, had timely notice of its coming, had promised sufficient accommodations for all that came, and accepted all that applied for passage, as long as there was standing room inside the cars and on the platform.

This instruction is further objected to on the ground that it told the jury that if the plaintiff himself, substantially or directly, contributed to his injury, Contributory  
Negligence. he could not recover. We think the learned counsel for the plaintiff in error has himself answered this contention, when he says in his brief:

"Contributory negligence means any negligence on the part of the plaintiff which helped or tended to produce the injury. There is no such thing as negligence being contributory, unless it caused, or helped to cause, the accident. The very term itself implies and means that the negligence of the plaintiff and defendant are concurring forces, which, united, produce the injury complained of; that is to say, that there is an actual, effective, proximate connection between the negligence of the plaintiff and his own injury. In other words, where contributory negligence exists, the accident would not have happened but for the fault or omission of the plaintiff. Contributory negligence, then, is always material and substantial. It is one of the causes producing the accident."

It is not, however, this language of the charge that is complained of, but the deductions which counsel draw from it. It is said:

"The court, in effect, told the jury that the conduct of Erickson might have been one of the causes producing the accident, that they might believe the injury would not have happened if he had been sober, yet they might, in their wisdom,

## Trumbull v. Erickson

still determine whether his conduct was such as substantially and materially contributed to his damage."

We are unable to find anywhere in the charge any language warranting the conclusion that the court told the jury, in effect, that the conduct of Erickson might have been one of the causes producing the accident, and that he might recover unless his conduct substantially or materially contributed to his injury. The language of the charge carefully excludes any such idea or deduction. The court told the jury over and over again that if "the plaintiff was negligent, and that negligence contributed to his injury," he could not recover, and that, if his intoxication was the proximate cause of his injury, he could not recover. Any negligence that contributed to his injury was substantial and material. It is impossible to conceive of any kind of negligence that would cause or contribute to an injury that would not be substantial and material.

The defendant preferred 19 requests for special instructions, all of which were properly refused. So far as they stated the law, they were covered by the clear and able charge in chief of the trial judge. Many of the special requests singled out particular items of the testimony, to the exclusion of other evidence in the case which the jury were bound to consider in forming their verdict. The practice of giving undue prominence to isolated facts of a case, by singling them out and making them the subject of special instructions, has been condemned. *Smith v. Condry*, 1 How. 28-36, 11 L. Ed. 35; *Railway Co. v. Ives*, 144 U. S. 408-433, 12 Sup. Ct. 679, 36 L. Ed. 485; *Mining Co. v. Berberich*, 36 C. C. A. 364, 94 Fed. 329. It gives undue prominence to the facts thus singled out, and tends to minimize and disparage other facts of equal or greater importance. They are the kind of instructions that may be multiplied indefinitely, though the party preferring a request for them is careful to limit his request to facts or items of testimony which he conceives make in his favor. A further vice of such instructions is that, drawn as they are from a partisan standpoint, they

## Note

usually give a partisan coloring to the fact or testimony to which they relate. Such instructions are burdensome, confusing, and misleading to the jury, and ought never to be given where, as in this case, the charge in chief clearly and sharply points out the issues of fact in the case, and leaves the determination of those issues to the jury upon a consideration of all the evidence in the case. "It is the settled law in this court," says the supreme court, "that if the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to instruct further. It may use its own language, and present the case in its own way. If the results mentioned are reached, the mode and manner are immaterial. The court then has done all that it is bound to do, and may thus leave the case to the consideration of the jury. Neither party has the right to ask anything more. *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151." *Railroad Co. v. Horst, supra*.

Same.

There are numerous other assignments of error, but such as do not fall within the reasoning of those we have decided are not of any general importance, and have no merit. They have all been carefully examined. The judgment of the circuit court is affirmed.

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NOTE.

**Whether Contributory Negligence for Passenger to Allow Ladies to Occupy Safest Position in Car.**—A passenger does not owe a duty to the company to push and crowd his way in order to get an advantage over other passengers in securing a place within the cars, and it does not follow, as a matter of law, that he will be guilty of negligence for not so doing. Nor will his duty to the company require that he shall wholly disregard the usual and ordinary courtesies and amenities of life. In fact, it is not necessarily, and as a matter of law, negligence to stand aside and allow ladies to occupy the safest and most desirable positions in a public conveyance. *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. Rep. 406.

Glover v. Charleston &amp; S. Ry. Co

GLOVER

v.

CHARLESTON &amp; S. RY. CO.

*(Supreme Court of South Carolina, April 5, 1900.)*

**Injury to Passenger while Alighting—Vindictive Damages.\***—Where a passenger is permanently disabled, while alighting from a car at the command of the conductor, through the reckless and wanton conduct of the employees in charge of the train, in allowing a portion of the train to be thrown against such car, so violently as to throw the passenger on the steps of his car, against its irons, vindictive damages may be recovered against the railroad.

**Damages—Pleading—Harmless Error.**—Under the present law of South Carolina, the recovery is not necessarily confined to punitive damages, although none other are claimed in the complaint; but defendant was not prejudiced by the error on this subject.

**APPEAL** by defendant from Colleton county common pleas circuit court. *Affirmed.*

*Mordecai & Gadsden*, for appellant.

*John D. Edwards* and *W. B. Gruber*, for respondent.

**POPE, J.** The first paragraph of the complaint merely sets up the incorporation of the defendant, and that at the time hereinafter set up it was acting as a common carrier of passengers for hire, etc. “(2) That on the 10th day of September, 1897, the defendant received the plaintiff into one of its passenger cars, drawn by a steam locomotive engine, for the purpose of conveying her therein, and upon said railroad, as a passenger, from Yemassee to Greenpond (both being on said railroad), for reward paid to the defendant by the plaintiff. (3) That while she was a passenger on said railroad, near the station house and passenger platform at Greenpond aforesaid, and while she was in the act of embarking from said passenger car on the

Case Stated.

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\*See notes, 12 Am. & Eng. R. Cas., N. S., 130 *et seq.*

*Glover v. Charleston & S. Ry. Co*

invitation and by the instruction of the conductor in charge of said train, the defendant, its agents and servants, so negligently, carelessly, and recklessly conducted itself in that behalf that the locomotive engine which had been attached to said train, and which had then been detached therefrom, was carelessly, negligently, and recklessly, and with great force, and without notice to the plaintiff, caused to be run back and come in contact with said passenger coach, throwing the said plaintiff with great force and violence against said passenger car, whereby she was greatly bruised and injured, her hip and back being thereby permanently injured. (4) That by reason of her injuries, the injuries to her hip and back being permanent in their nature, the plaintiff was made sick, and remained and is still sick, and suffered and will continue to suffer great bodily pain and mental anguish in consequence of such bodily injuries, and has expended and will be forced to expend large sums of money for medical attention and other like services in treating her injuries, and has been and still is unable to attend to her business and properly perform her household and other domestic duties, to her damage ten thousand dollars." The answer admitted the first paragraph of the complaint, but denied the remaining articles. The cause came on for trial before his honor, JUDGE TOWNSEND, and a jury, at the fall, 1899, term of the court of common pleas for Colleton county, S. C. Verdict was for the plaintiff. After judgment, defendant appealed on the following grounds: "First. Because his honor erred in charging the jury: 'They have said, further, that if the complaint is for punitive damages, none other should be given; if it is for actual damages, none other should be given,—as I illustrated in the case of the box of shoes.' Second. Because his honor erred in charging the jury, as the law applicable to this case, the following extract from the case of *Spellman v. Railroad Co.*, 35 S. C. 486, 14 S. E. 949: 'We observe that the presiding judge, in charging the jury, speaks of the necessity of the jury only giving actual damages if they take one view of the case,



Glover v. Charleston &amp; S. Ry. Co

and, if they accept another view of the same case, the jury must give exemplary damages. According to our view of the law, this is all wrong; for where a cause of action set up in the complaint is for exemplary damages, and such exemplary damages and none other should be awarded, if the plaintiff fails by his proofs to establish such damages, the verdict should be for the defendant. Where the cause of action set up in the complaint is for actual damages, the plaintiff is entitled to recover nothing but actual damages. A different view would defeat the very object of pleadings.' Third. Because his honor erred in charging the jury as follows: 'I did have an idea that maliciousness should be alleged, but, under this authority, I see recklessness is there, and that makes it a complaint for punitive, vindictive, or exemplary damages; and the supreme court says under the complaint for exemplary damages none other than exemplary damages should be given.' Fourth. Because his honor should have charged the jury that under this complaint, if they found for the plaintiff, they should award her either actual damages, punitive damages, or both. Fifth. That his honor, in excluding from the consideration of the jury the actual damages of the plaintiff, and instructing them that they could only award punitive damages, deprived defendant of the right to have the jury, in their discretion, award to the plaintiff only her actual damages. Sixth. Because his honor erred in charging the jury as follows: 'Was she injured? If you find that she was not injured, that is the end of it. If you find she was injured, then under what circumstances? We are all bound to exercise due care. If we are not using due care and prudence,—the care and prudence which a prudent man would use under the same circumstances— In that illustration about the box of shoes: If I was pursuing a lawful occupation when I destroyed the shoes, and was using care and prudence,—the care and prudence of an ordinary man,—I would not be liable; but, if I did not use due care, I would be liable. If you find the plaintiff was injured by the defendant, then

*Glover v. Charleston & S. Ry. Co*

under what circumstances? Was the defendant acting with the care which a prudent man would use under the same circumstances; that is, doing the same things? Then inquire if the act of the defendant was the immediate cause of the injury.' Whereas, his honor should have charged the jury that punitive damages are not allowed for ordinary negligence, but that, in order to recover punitive damages, the plaintiff must show by the testimony that the act complained of on the part of the defendant was characterized by willfulness, malice, fraud, wantonness, recklessness, oppression, or gross negligence. Seventh. Because his honor erred in refusing to grant a new trial herein on the ground that there was entire absence of any testimony tending to support a cause of action for punitive, vindictive, or exemplary damages.'

We will examine the seventh ground of appeal first, as by doing so a brief recital of the facts of the case will be necessary; thus giving an idea of what the plaintiff's cause of action consists, as made to appear from the testimony. The plaintiff, Mrs. Catherine C. P. Glover, was a widow residing at Walterboro, S. C., with a family consisting of two sons and a daughter. Before the 10th day of September, 1899, Mrs. Glover was able to perform all her duties as a housekeeper, and to manage a farm that she owned at some eight miles distance from her home at Walterboro, which farm she rented out; but on her farm she raised cattle, hogs, sheep, and goats, profitably. In addition to this, she supplemented her income by taking in sewing. Thus, though deprived of the aid of her husband, who had died some four years before that date, by her industry and thrift she was able to maintain her fatherless children in comfort, pay her taxes, and even, by degrees, pay off some debts. No one appears to contradict the testimony offered in her behalf on all these matters. But on the 10th day of September, 1897, the life of Mrs. Glover was changed,—so changed that never on earth is it likely that her health will be fully restored. It is now so

Glover v. Charleston &amp; S. Ry. Co

that she has had to sell off her stock of cattle, hogs, sheep, and goats, because she was no longer able to take care of them. She cannot overlook her farm. She can no longer sew for herself or for others, and she cannot superintend her household affairs. If she undertakes to perform any of these acts, she is filled with bodily pain, and must keep her bed. All these results followed from what occurred while she was a passenger on defendant's train, and while in its care and under its direction. It seems that when defendant's train, on September 10, 1897, reached Greenpond (a station at which a change of cars had to be made in order to go on to Walterboro), the passenger car was not carried up to the station house, but was left at a distance of from 50 yards to 100 yards from the station; and the conductor, Mr. Hugunin, directed the passengers to alight from the said defendant's passenger coach. The conductor and several of the passengers had already alighted, but while Mrs. Catherine C. P. Glover was on the steps of the passenger car, and while the conductor stood ready to assist her to alight, an engine and several cars were suddenly, without any notice, with great violence, and recklessly, thrust against said passenger coach; and as the result thereof the plaintiff, Mrs. Glover, was thrown with great violence against the irons on said steps, thereby working serious damages to her hip joint and side, by bruising the same, and so injuring the same that she is now in the condition just above described. The circuit judge construed her complaint to be an action to recover exemplary or vindictive damages for the negligence and wanton recklessness of the defendant railway. Now, after the jury had heard the testimony on both sides, they found a verdict for \$5,500, in favor of the plaintiff. If there was any material, competent testimony bearing upon this issue of vindictive damages, the circuit court should not have granted a new trial; but the responsibility is that of the circuit judge, and we can interfere only in case there was no testimony on this issue. We might as well state the

## Glover v. Charleston &amp; S. Ry. Co

fact explicitly, so as not to be misunderstood by the defendant or any other railroad. In case any railroad has passengers in one of its passenger coaches and, on their alighting therefrom at the command of the conductor in charge of such train, shall allow an engine and cars under the charge of one of its servants, without any warning to the passengers, and while one of the passengers is on the steps of said passenger car, recklessly and wantonly to be thrown against said passenger car with such violence as to throw such passenger, on the steps of such passenger car, against the irons of the passenger car, thereby permanently injuring such passenger in the manner we have hereinbefore described, we will not hesitate to denounce such an outrage as being a case where vindictive damages will be supported. This exception is overruled.

Injury to Passenger while Alighting—Vindictive Damages.

We think the first three exceptions should be considered together. There is no doubt but that the act of the general assembly of this state entitled "An act to regulate the practice of the courts of this state in actions *ex delicto* for damages" (22 St. at Large, p. 693) had altered the practice in this state in actions

Damages—Pleading—Harmless Error.

*ex delicto* for damages, and that, since this act, so much of the case of *Spellman v. Railroad Co.*, 35 S. C. 475, 14 S. E. 947, as indicated that the pleadings in our courts in damage suits should point out whether punitive or actual damages were sought, and that the recovery in such suits should correspond to the issue thus raised, is no longer authority in this state. Therefore, when the circuit judge followed the *Spellman Case* in his charge to the jury, he was in error; but it occurs to us that this was harmless error, so far as the appellant is concerned. If Mrs. Glover had complained of the charge of the judge, she would have prevailed, because it is very sure that her recovery was lessened by the jury not adding her actual damages to the vindictive damages, thus increasing their verdict. We take a little different view, or, rather, we suggest that a little different view of the testimony offered by the plaintiff, which, the appellant insists, points

Smith v. Norfolk &amp; W. Ry. Co

out the actual damages she suffered, may be taken; for may it not be said that the doctor's bills, and injury to her income, to both of which the testimony was offered, was intended to show how the injury wrought by the railroad affected the plaintiff, thereby proving to the jury that the recklessness and wantonness of the railroad in the conduct of its business were active? These exceptions must be overruled.

So far as the sixth ground of appeal is concerned, we may remark that we see very little ground for a criticism of the judge's charge, as here pointed out, as the same affects the appellant. It seems to refer to actual damages, but, as we have already seen, the circuit judge positively instructed the jury that their verdict must be confined to vindictive damages, and that the jury were not to consider actual damages. This exception is overruled. We should have remarked that the circuit judge had already in his charge referred to vindictive damages as resulting from the reckless negligence—wanton negligence—of the railroad, so that it was not to be expected that any injury could be said to follow to the appellant. The grounds of appeal are all overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

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SMITH

v.

NORFOLK &amp; W. RY. CO.

*(Supreme Court of Appeals of West Virginia, April 14, 1900.)*

**Conductor Assaulting Passenger—Liability of Railroad.\*—**A railroad company is liable to a passenger on one of its trains for a willful assault and battery committed on such passenger by the conductor in charge of such train. Such an assault is a breach of the duty of protection which such company owes to its passengers.

**Appeal Review.** The verdict of a jury, depending on the weight of oral testimony and the credibility of witnesses, will not be dis-

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\*See notes, 12 Am. & Eng. R. Cas., N. S., 200 et seq.

Smith v. Norfolk & W. Ry. Co

turbed, unless for some reason there has been a plain miscarriage of justice.

(Syllabus by the Court.)

ERROR by defendant to Wayne county circuit court.  
*Affirmed.*

*J. Campbell and Holt & Campbell* for plaintiff in error.

*J. M. Tiernan and J. T. Graham*, for defendant in error.

DENT, J. Defendant obtained a writ of error from one of the judges of this court to a judgment against it for the sum of \$500 rendered on the 11th day of October, 1898, by the circuit court of Wayne county on a verdict of a jury in favor of the plaintiff for an aggravated assault made upon him, while a passenger on one of the defendant's trains, by the conductor thereof. There are two main grounds relied on, to wit, that the verdict is contrary to the law and the evidence, and that the court erred in giving the following instruction, designated as No. 2: "The court instructs the jury that if they should believe from a preponderance of the evidence in this case that the plaintiff, at the time of the injury complained of, while riding as a passenger on the defendant's train, was cursing or behaving in a riotous or disorderly manner, then it was the privilege of the defendant to put him off such train, and the law gave the conductor and trainmen in charge of such train the right to use such force as was necessary for that purpose; but no such conduct on the part of the plaintiff would license or authorize the conductor on such train to unnecessarily assault and beat the plaintiff." The defendant insists that this instruction garbles the evidence, in not adding thereto: "And if the jury further find that the plaintiff did not first assault the conductor." There are two objections to this amendment. The one is that it is already sufficiently and substantially contained in the words "riotous and disorderly manner"; and the other is that, if the plaintiff did first assault the conductor, that would not justify the conductor in unnecessarily assaulting and beating the plaintiff. The

Smith v. Norfolk &amp; W. Ry. Co

distinction attempted to be drawn is entirely too fine of comprehension to have any weight with the ordinary judicial mind, and could not possibly have affected the verdict of the jury prejudicially to the defendant. The question submitted to the jury was as to whether the conductor unnecessarily assaulted the plaintiff. He, being a passenger, was entitled to protection; and the law enjoins on the conductor, as the representative of the defendant, this duty. Common carriers are liable for the willful, wanton, malicious, or illegal conduct of an employee towards passengers on their trains,

Conductor Assaulting Passenger—Liability of Railroad.

when such conduct is a breach of the duty owed to the persons intrusting themselves to their care, at their solicitation, for compensation.

Claiborne v. Railway Co. (W. Va.), 33 S. E. 262; Gillingham v. Railroad Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798. The evidence in this case is conflicting. There is no question but that the conductor did assault the plaintiff, a passenger on his train, who had paid his fare, and was entitled to ride thereon and to the protection of the defendant. The plaintiff's evidence shows that such assault was aggravated and unjustifiable, to such an extent as clearly to establish maliciousness. The defendant's evidence, standing alone, would establish complete justification, and destroy the aggravated character of the assault, and therewith malice. The conflict thus presented is one for a jury to determine. It depends almost entirely on the credibility of the witnesses, and the weight given thereto by the verdict of the jury, sustained by the trial court. The evidence does not plainly preponderate in favor of the defendant, and, according to the many rulings of the court, the judgment cannot be disturbed. Trump v. Coke Co. (W. Va.), 33 S. E. 1035; Young v. Railroad Co., 44 W. Va. 218, 28 S. E. 932; Sisler v. Shaffer, 43 W. Va. 769, 28 S. E. 721; Akers v. De Witt, 41 W. Va. 229, 23 S. E. 669. This court still recognizes as sacred the limited province of jury trial. A careful examination of the record shows no reversible error. The judgment is therefore affirmed.

Appeal—Review.

Baltimore & Ohio Southwestern Railway Co. v. Voigt

BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY

v.

VOIGT.

(*Supreme Court of the United States, February 26, 1900.*)

**Injury to Express Messenger—Validity of Contract Exempting from Liability for Negligence.\***—Where a railroad company transports cars used exclusively by an express company, under a contract between the companies exempting the railroad from all liability for any injuries sustained by express messengers while being transported on such cars, and an express messenger, in consideration of employment by the express company, assumes the risk of all such injuries, and expressly ratifies the agreement between the companies exempting the railroad from liability for such injuries, he cannot recover for such an injury sustained by him through the negligence of the railroad; as he cannot avoid the agreement exempting the railroad from liability, by invoking that principle of public policy which forbids a common carrier of passengers for hire to contract against responsibility for negligence.

**CERTIFICATE** from the United States circuit court of appeals for the sixth circuit. *Answered in favor of defendant.*

**Statement by MR. JUSTICE SHIRAS:**

The following statement and question were certified to this court by the judges of the circuit court of appeals for the sixth circuit:

"This was an action brought by William Voigt, the defendant in error, against the Baltimore & Ohio Southwestern Railway Company, the plaintiff in error, to recover for damages sustained by him in consequence of a collision between two trains of the plaintiff in error, upon one of which—a fast passenger train—he was riding at the time of the accident.

\*See *Voigt v. B. & O. S. W. Ry. Co. (C. C.)*, 9 Am. & Eng. R. Cas., N. S., 835, and see *foot-note*.



## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

He was an express messenger riding in a car which was set apart for the use of the United States Express Company, and occupied by that company for its purposes under a contract between the express company and the railway company. The plaintiff alleged in his petition that he was traveling as a passenger for hire on one of the defendant's trains, being an express messenger on said train. In fact, he was upon said train only by virtue of his employment as express messenger of his company and the above-mentioned contract between his company and the railway company. The answer of the railway company set up two grounds of defense. The first admitted that Voigt was an express messenger on its train, but denied that he was traveling as a passenger for hire. The railway company also admitted that on the occasion of the injury complained of, the train on which he was riding came into collision with another of its trains, and that in the collision Voigt sustained injuries. The second ground of defense, inasmuch as it sets out the specific matter in controversy, is here set forth in detail:

“For a second and separate defense the railway company answered that on the day in question it was, and had for a long time prior thereto been, a corporation under the laws of Ohio, engaged in the operation of its railroad from Cincinnati to St. Louis and other places, and was so engaged at the time of the collision referred to; and that on the 1st day of March, 1895, it entered into a contract with the United States Express Company, a joint-stock company duly authorized by law to carry on the express business and to enter into such contract; and that by said contract it was agreed between the express company and the railway company, among other things, that the railway company would furnish for the express company, on the railway company's line between Cincinnati and St. Louis, cars adapted to the carriage of such express matter as the express company desired to have transported over said line; and that it was part of said contract that one or more employees of said express company should accompany said goods in said cars over the said line of said rail-

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

road, and for such purpose should be transported in said cars free of charge; and that it was further provided in said contract that the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employees of the express company for injury they might sustain while being transported by the railway company over its line for the purpose aforesaid, whether the injuries were caused by negligence of the railway company or its employees, or otherwise. The railway company further averred that, pursuant to said contract with the express company, it placed upon its line of railroad for said express company certain cars known as express cars; and that it was hauling one of said cars on one of its trains on the 30th of December, 1895, at the time said collision occurred; and that prior to the time of the accident Voigt had made application to the express company in writing for employment by it as an express messenger; and that in pursuance to said application he was, prior to and at the time of the collision, employed by the express company under a contract in writing between him and it, by the terms whereof he did assume the risk of all accidents and injuries that he might sustain in the course of his said employment, whether occasioned by negligence and whether resulting in death or otherwise, and did undertake and agree to indemnify and hold harmless the said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such injury resulted from negligence or otherwise, and did agree to pay to said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and did agree to execute and deliver to the corporation operating the transportation line (in this instance the railway company) upon which he might be injured, a good and sufficient release under his hand and seal of all claims, demands, and causes of action arising out of any such injury or connected with or resulting therefrom, and did ratify all

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

agreements made by the express company with any transportation line (in this instance said railway company), in which said express company had agreed or might agree that the employees of said express company should have no cause of action for injuries sustained in the course of their employment upon the line of such transportation company; and that the said Voigt did further agree to be bound by each and every one of the agreements above mentioned as fully as if he were a party thereto. He did agree that his contract with the express company should inure to the benefit of any corporation upon whose line said express company should forward merchandise (in this instance the said railway company), as fully and completely as if made directly with the corporation. In said defense it was further set forth that at the time the plaintiff sustained the injuries for which the suit was brought he was in an express car being transported by the railway company over its line from Cincinnati to St. Louis, pursuant to said contract between said express company and the railway company, and that said Voigt was at the time of the collision upon said car in pursuance to his contract with said express company, and not otherwise.'

"To this second defense a demurrer was interposed by Voigt on the ground that the allegations therein did not constitute a defense to the action. Upon the hearing of this demurrer it was sustained, and an entry was made of record, finding the demurrer well taken. The opinion of the court sustaining the demurrer is published in 79 Fed. Rep. 561. The decision of the court went upon the ground that, although Voigt was an express messenger riding upon an express car in the circumstances stated, he was a passenger for hire and entitled to the rights accorded by law to ordinary passengers traveling by a train of a common carrier, and, further, that it was not competent for the railway company to absolve itself from the duties which rest upon a common carrier in reference to its passengers. A stipulation in writing was filed waiving a trial by jury, and the case was tried by the court. The finding of the issues was in favor of the plaintiff, and the

Baltimore & Ohio Southwestern Railway Co. v. Voigt

damages were assessed at the sum of \$6,000, and judgment was thereupon entered that the plaintiff recover that sum, with costs. The defendant brings the case here on writ of error, and assigns errors, the substance of which is involved in the ruling of the court below sustaining the demurrer to the second defense of the answer of the defendant; and the controversy here involves the question whether in point of law a messenger of an express company, occupying a car of a railway company assigned to an express company for the prosecution of its business under a contract fixing the relations of the railway company and the express company which, for the consideration shown by the contract, absolves the railway company from the consequence of its negligence to the express company and its employees, and to which the employee agrees upon entering the service of the express company, stands in the ordinary relation of a common carrier of passengers for hire to the employee of the express company. The rule is undoubtedly well settled that a railway company standing in the relation of a common carrier to a passenger for hire cannot absolve itself from liability or the consequences of its negligence in carriage, but the members of the court are in doubt whether the defendant in error comes within the rule above mentioned, and therefore upon the foregoing statement of fact it is ordered that the following question be certified to the Supreme Court of the United States for its instruction:

*"Question.*

"A railroad company engaged as common carrier in the business of transporting passengers and freight for hire entered into a contract in writing with an express company authorized by law to do and actually doing the business known as express business, by which contract the railroad company agreed, solely upon the considerations and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express business over said railway company's lines, certain privileges, facilities, and express cars to be used and employed

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

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## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

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## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

exclusively by said express company in the conduct of such express business; and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as express messengers, for that purpose to be allowed to ride in said express cars; to transport such express messengers for the purposes and under the circumstances aforesaid free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities, and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employees of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employees, or otherwise. A person made application to said express company in writing to be employed by it as express messenger on the railroad of the company between which and such express company a contract as aforesaid existed; and such applicant, pursuant to the application aforesaid, was employed by said express company under a contract in writing signed by him and it, whereby it was agreed between him and such express company that he did assume the risk of all accident or injury he might sustain in the course of said employment, whether occasioned by negligence or otherwise, and did undertake and agree to indemnify and hold harmless said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise; and to pay said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and to execute and deliver to said railroad company

Baltimore & Ohio Southwestern Railway Co. v. Voigt

a good and sufficient release under his hand and seal of all claims and demands and causes of action arising out of or in any manner connected with said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company.

"Does said railroad company assume towards such express messenger while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railroad company, pursuant to the contracts aforesaid, the ordinary liability of a common carrier of passengers for hire, so as to render said railroad company liable as such to said express messenger, notwithstanding the contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train of said railroad company, caused by the negligence of employees of the railroad company?"

*Messrs. Edward Colston, Judson Harmon, A. W. Goldsmith, and George Hoadly, Jr., for plaintiff in error.*

*Messrs. Charles M. Cist and Edgar W. Cist, for defendant in error.*

MR. JUSTICE SHIRAS delivered the opinion of the court:

The question we are asked to answer is whether William Voigt, the defendant in error, can avoid his agreement that the railroad company should not be responsible to him for injuries received while occupying an express car as a messenger, in the manner and circumstances heretofore stated, by invoking that principle of public policy which has been held to forbid a common carrier of passengers for hire to contract against responsibility for negligence.

The circuit judge thought the case could not be distinguished from the case of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, where a recovery was maintained by a drover injured while traveling on a stock train of the New York Central Railroad Company proceeding from Buffalo to Albany, on a pass which certified that he had



## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

shipped sufficient stock to give him a right to pass free to Albany, but which provided that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. This court held that a drover traveling on a pass, for the purpose of taking care of his stock on the train, is a passenger for hire, and that it is not lawful for a common carrier of such passenger to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 9 Sup. Ct. Rep. 469.

The principles declared in those cases are salutary, and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by SIR GEORGE JESSEL, M. R., in *Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 465:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract."

Upon what principle, then, did the cases relied on proceed, and are they applicable to the present one? They were

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

mainly two. First, the importance which the law justly attaches to human life and personal safety, and which therefore forbids the relaxation of care in the transportation of passengers which might be occasioned by stipulations relieving the carrier from responsibility. This principle was thus stated by MR. JUSTICE BRADLEY in the opinion of the court in the case of *New York C. R. Co. v. Lockwood*:

"In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties,—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly, for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms."

The second fundamental proposition relied on to nullify contracts to relieve common carriers from liability for losses or injuries caused by their negligence is based on the position of advantage which is possessed by companies exercising the business of common carriers over those who are compelled to deal with them. And again we may properly quote a passage from the opinion in the *Lockwood Case* as a forcible statement of the situation:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle, or stand out and seek redress in the courts. His business will not admit such a course. He

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. . . . If the customer had any real freedom of choice, if he had a reasonable or practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is almost concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality."

Upon these principles we think the law of to-day may be fairly stated as follows: 1. That exemptions claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding. 2. That all attempts of carriers, by general notices or special contract, to escape from liability for losses to shippers, or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but as contrary to a sound public policy, and therefore invalid.

But are these principles, well considered and useful as they are, decisive of, or indeed applicable to, the facts presented for judgment in the present case?

We have here to consider not the case of an individual shipper or passenger dealing, at a disadvantage, with a pow-

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

erful corporation, but that of a permanent arrangement between two corporations embracing within its sphere of operation a large part of the transportation business of the entire country. We need not, in this inquiry, examine the nature of the business of an express company, or rehearse the particular services it renders the public. That has been done, sufficiently for our present purpose, in the Express Cases, 117 U. S. 1, *sub nom.* Memphis & L. R. R. Co. v. Southern Exp. Co., 29 L. Ed. 791, 6 Sup. Ct. Rep. 542, 628, and from the opinion in that case we shall make some pertinent extracts :

"The express business . . . has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long-settled habits of business, and interfering materially with the conveniences of social life.

"When the business began, railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started, that it has not been encouraged by the railroad companies, and it is no doubt true . . . that 'no railroad company in the United States . . . has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company . . . has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter.'

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

"But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary, it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in this record, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. . . . The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is 'express,' it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have, from the beginning, been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of the passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. . . . In this way three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying, when

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

these suits were brought, one hundred and fifty-five railroads, with a mileage of 21,216 miles; the American, two hundred roads, with a mileage of 28,000 miles; and the Southern, ninety-five roads, with a mileage of 10,000 miles. Through their business arrangements with each other and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all who need their services. The goodwill of their business is of very great value if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits and the better their means of serving the public. In making their investments and in extending their business they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time."

The cases from the opinions in which are taken the foregoing extracts were suits brought by certain express companies which had been doing business on certain railroads under special contracts between the respective companies, to compel the railroad companies to permit them to continue business on the roads on terms to be fixed by the courts; in other words, to demand as a right what they had theretofore enjoyed by permission of special contracts. This the court declined to do, and directed the bills to be dismissed.

Our citations have been intended partly to disclose, in a succinct form, the nature of the express business, but more

Baltimore & Ohio Southwestern Railway Co. v. Voigt

particularly to show that, in essence, the express business is one that requires the participation of both the companies on terms agreed upon in special contracts, thus creating, to a certain extent, a sort of partnership relation between them in carrying on a common carrier business.

We are not furnished in this record with an entire copy of the contract between the plaintiff in error, the Baltimore & Ohio Southwestern Railway Company, and the United States Express Company, but it is sufficiently disclosed in the statement made by the judges of the circuit court of appeals, that the companies were doing an express business together as common carriers under an agreement entered into on March 1, 1895; that by said contract it was agreed that the railway company would furnish, on its line between Cincinnati and St. Louis, for the express company, cars adapted to the carriage of express matter over said line; that one or more employees of said express company should accompany said goods in said cars over the said line, and for such purpose should be transported in said cars, free of charge; that the express company should protect the railway company and hold it harmless from all liability for injuries sustained by the employees of the express company while being transported for the said purpose over the railroad; that Voigt, the defendant in error, had agreed in writing to indemnify the express company against any liability it might incur by reason of said agreement between the companies, so far as he was concerned, and further agreed to release the railroad company from liability for injuries received by him while being transported in the express cars; that, in consideration of such agreement on his part, Voigt was employed as an express messenger, and while so employed, and while occupying as such messenger a car assigned to the express company, received injuries occasioned by a collision, on December 30, 1895, between the train which was transporting the express car and another train belonging to the same railroad company.

It is evident that, by these agreements, there was created a



## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation of the car especially adapted to the uses of the express company was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal-contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him or to each other for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the Lockwood and similar cases, where the dispensation from liability for injuries was made a condition of a transportation which the passenger had a right to demand, and which the railroad companies were under a legal duty to furnish. Doubtless, had Voigt only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of such a passenger. But this he did not desire. He was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract which, as we have seen, the railroad company was under no legal compulsion to enter into.

The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employee than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business,—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be

Baltimore & Ohio Southwestern Railway Co. v. Voigt

performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employee of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow servants.

However this may be, it is manifest that the relation existing between express messengers and transportation companies, under such contracts as existed in the present case, is widely different from that of ordinary passengers, and that to relieve the defendant in error from the obligation of his contract would require us to give a much wider extension of the doctrine of public policy than was justified by the facts and reasoning in the Lockwood Case.

This subject has received attentive consideration in several of the state courts.

In *Bates v. Old Colony R. Co.*, 147 Mass. 255, 17 N. E. 633, it was held that if an express messenger holding a season ticket from a railroad company, and desiring to ride for the conduct of his business in a baggage car, agrees to assume all risk of injury therefrom, and to hold the company harmless therefor, the agreement is not invalid as against public policy, and he cannot recover for injuries caused by negligence of the company's servants. In its opinion the court said:

"The question of a right of carriers to limit their liability for negligence in the discharge of their duties as carriers by contract with their customers or passengers in regard to such duties does not arise under this contract as construed in this case. See *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Griswold v. New York & N. E. R. Co.*, 53 Conn. 371, 4 Atl. 261. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. . . . The fact that the plaintiff was riding in the baggage car as an express messenger in charge of merchandise which was being transported there shows more clearly that the contract by the express company and the plaintiff was not unreasonable or against public policy. He was there as a servant engaged with the servants of the railroad corporation in the service of transportation on the road. His duties were substantially the same as those of the baggage-master in the same car; the latter relating to merchandise carried for passengers, and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as those of the baggage-master, and would have been the same had he been paid by the corporation instead of by the express company. Had the railroad done the express business, the messenger would have been held by law to have assumed the risk of the negligence of the servants of the railroad. It does not seem that a contract between the express company and the plaintiff on the one hand, and the defendant on the other, that the express messenger in performing his duties should take the same risk of injury from the negligence of the servants of the railroad engaged in the transportation that he would take if employed by the railroad to perform the same duties, would be void as unreasonable or as against public policy."

The same ruling prevailed in the subsequent case of *Hosmer v. Old Colony R. Co.*, 156 Mass. 506, 31 N. E. 652.

*Robertson v. Old Colony R. Co.*, 156 Mass. 526, 31 N. E. 650, was an action brought for personal injuries caused to the plaintiff, an employee of the proprietors of a circus, while riding in a car belonging to the proprietors, drawn by the defendant company over its road under a written agreement, in which it was provided that the circus company should agree to exonerate and save harmless the defendant from any and all claims for damages to persons or property

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

during the transportation, however occurring; and it was held that, as the defendant company was under no common-law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and that the plaintiff could not recover.

*Griswold v. New York & N. E. R. Co.*, 53 Conn. 371, 4 Atl. 261, where a restaurant keeper had the privilege to sell fruits and sandwiches on the trains, and to engage and keep a servant for that purpose on the trains, riding on a free pass, it was held that such servant could not recover for injuries sustained on the train caused by the negligence of the company's servants, because he was not a passenger.

The supreme court of Michigan, in *Coup v. Wabash, St. L. & P. R. Co.*, 56 Mich. 111, 22 N. W. 215, where a railroad company, under a special agreement, was to furnish men and motive power to transport a circus of the plaintiff from Cairo to Detroit on cars belonging to the plaintiff, stopping at certain named points for exhibition, the plaintiff paying a fixed price therefor, held that such transportation was not a transaction with a common carrier as such, that the contract was valid, and that the railway company was not liable for injury due to negligence.

Where a railroad company made a special contract in writing with the owner of a circus to haul a special train between certain points, at specified prices, and stipulating that the railroad company should not be liable for any damage to the persons or property of the circus company from whatever cause, it was held by the circuit court of appeals of the seventh circuit, citing *Coup v. Wabash, St. L. & P. R. Co.*, 56 Mich. 111, 22 N. W. 215, and *Robertson v. Old Colony R. Co.*, 156 Mass. 506, 31 N. E. 650, that the railroad company was not acting as a common carrier, and was not liable under the contract for injuries occasioned by negligent management of its trains. In its opinion the court quoted the following passage from *New York C. R. Co. v. Lock-*

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

wood: "A common carrier may undoubtedly become a private carrier or bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry." Chicago, M. & St. P. R. Co. v. Wallace, 24 U. S. App. 589, 66 Fed. Rep. 506, 14 C. C. A. 257, 30 L. R. A. 161.

Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 5 Am. & Eng. R. Cas., N. S., 26, 38 L. R. A. 93, 44 N. E. 796, was a case in all respects like the present. It was a suit by a messenger of the American Express Company against the railroad company for personal injuries. The contracts between the express company, the messenger, and the railroad company were in terms similar to those existing in the present case, and the defense was the same as that made here. It was held that the contracts were valid and that the defense was good. It was said:

"Under the doctrine declared in the Express Cases, 117 U. S. 1, *sub nom.* Memphis & L. R. R. Co. v. Southern Exp. Co., 29 L. Ed. 791, 6 Sup. Ct. Rep. 542, 628, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known to the law by which the right, either as to the goods or appellee as express messenger in charge, could be acquired.

"Appellee, when he went on the appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon the train; that was merely incidental. His purpose was not to be upon the train, in the cars provided for passengers, but that he might handle and care for the property of his employer thereon in the space set apart in the baggage car for that purpose. Under the authorities cited it was not the duty of appellant, as a com -

## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

mon carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant as a common carrier could not have been compelled to grant."

By the supreme court of Indiana, in *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 8 Am. & Eng. R. Cas., N. S., 441, 40 L. R. A. 101, 46 N. E. 917, 47 N. E. 464, it was held that railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity may require exemption from liability for negligence as a condition to the obligation to carry, and that a release by an employee of an express company of all liability for injuries sustained by the negligence of the employer or otherwise includes the liability of the express company to hold a railroad company with which it does business harmless against claims by employees of the express company for injuries and precludes an action against the railroad company for causing his death while in discharge of his duty as employee of such express company.

A precisely similar question was presented in the case of *Blank v. Illinois C. R. Co.* and was decided the same way by the court of appeals for the first district of Illinois, in an opinion rendered March 14, 1899. 80 Ill. App. 475. The court cites the Express Cases, and approves and applies the reasoning in the Indiana cases; and this judgment has been affirmed by the supreme court of Illinois. 182 Ill. 332, 55 N. E. 332.

The same doctrine prevails in the state of New York. *Bissell v. New York C. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369; *Poucher v. New York C. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364. Though it must be allowed that the New York decisions are not precisely in point, as those courts do not accept the doctrine of *New York C. R. Co. v. Lockwood* to its full extent, but hold that no rule of public policy forbids contractual exemption from liability, because the public is amply protected by the right of everyone to decline any

Baltimore & Ohio Southwestern Railway Co. *v.* Voigt

special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge.

As against these authorities there are cited, on behalf of the defendant in error, several cases in which it has been held that postal clerks, in the employ of the government, and who pay no fare, are entitled to the rights of ordinary passengers for hire and it is contended that their relation to the railroad company is analogous to that of express messengers. *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 Sup. Ct. Rep. 859; *Cleveland C. C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346, 19 L. R. A. 339, 33 N. E. 116; *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75.

There is, however, an obvious distinction between a postal clerk and the present case of an express messenger in this, that the messenger has agreed to the contract between the express and the railroad companies, exempting the latter from liability, but no case is cited in which the postal clerk voluntarily entered into such an agreement. To make the cases analogous it should be made to appear that the government, in contracting with the railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that the latter, in consideration of securing his position, had concurred in releasing the railroad company.

*Brewer v. New York, L. E. & W. R. Co.*, 124 N. Y. 59, 11 L. R. A. 483, 26 N. E. 324, is also cited as a case wherein a recovery was maintained by an express messenger against a railroad company, and where there existed an agreement between the express company and the railroad company that the latter should be indemnified and protected against from all risks and liabilities. But the court put its judgment against the railroad company expressly upon the ground that the messenger had no knowledge or information of the con-

Baltimore & Ohio Southwestern Railway Co. v. Voigt

tract between the companies, and was not himself a party to the agreement to exempt the railroad company.

Kenny v. New York C. & H. R. R. Co., 125 N. Y. 422, 26 N. E. 626, was also a case where, in an action for damages by an express messenger against a railroad company, the plaintiff was permitted to recover, notwithstanding there was an agreement between the companies that the railroad company should be released and indemnified for any damage done to the agents of the express company, whether in their employ as messengers or otherwise. But it did not appear that there had been any assent to a knowledge of this contract on the part of the messenger; and the court said:

"Our decision, however, is placed upon the ground that this contract does not, in unmistakable language, provide for an exemption from liability for the negligence of the defendant's employees. The rule is firmly established in this state that a common carrier may contract for immunity from its negligence or that of its agents; but that to accomplish that object the contract must be so expressed, and it must not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation except when the carrier's immunity from the consequences of negligence is read in the agreement *ipsis verbis*."

Chamberlain v. Pierson, 59 U. S. App. 59, 87 Fed. Rep. 421, 31 C. C. A. 158, in the circuit court of appeals of the fourth circuit, was a case in which an express messenger was injured while traveling on a railroad which had a contract with the express company, exonerating the foreman from responsibility for injuries to the agents of the latter, and in which said agreement was ineffectually pleaded in bar of the action. The court said:

"The discussion of this feature of the case presents the question: Was the plaintiff below, as a messenger of the express company, bound by the contract between the railroad company and the express company to assume all risks to



## Baltimore &amp; Ohio Southwestern Railway Co. v. Voigt

life and limb to which he was exposed in performing his duties on the train as an express messenger? He was not a party to the contract, never ratified it, and in his testimony, when asked if he knew of this provision of the contract, . . . answered, 'If I had known that I wouldn't have gone.' "

Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of New York C. R. Co. v. Lockwood; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy.

*Accordingly, we answer the question submitted to us by the judges of the Circuit Court of Appeals in the negative; and it is so ordered.*

MR. JUSTICE HARLAN, dissenting:

In New York C. R. Co. v. Lockwood, 17 Wall. 357, 384, 21 L. Ed. 627, 641, it was held that a "common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law;" that "it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants;" that "these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter;" and that "a drover traveling on a pass, such as was given in this case, . . . is a passenger for hire." The railroad pass referred to declared that its acceptance was to be considered a waiver of all claims for damages or injuries received on the train. The above principles have been recognized and enforced by this court in numerous cases.

I am of opinion that the present case is within the doctrines

Warfield v. Louisville & N. R. Co

of New York C. R. Co. v. Lockwood, and that the judgment should be affirmed upon the broad ground that the defendant corporation could not, in any form, stipulate for exemption from responsibility for the negligence of its servants or employees in the course of its business, whereby injury comes to any person using its cars, with its consent, for purposes of transportation. That the person transported is not technically a passenger and does not ride in a car ordinarily used for passengers is immaterial.

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WARFIELD

v.

LOUISVILLE & N. R. Co.

HARRINGTON v. SAME.

(*Supreme Court of Tennessee, Jan. 27, 1900.*)

Instructions.—In an action for ejecting two girls from defendant's train, the court charged the jury that they must determine whether the younger child was in charge and control of the older, and, if so, and if the latter refused to pay the other child's fare, both might be ejected. *Held*, that the charge was not erroneous for failing to define more specifically the meaning of "charge and control;" but, if so, additional instructions upon the point should have been requested.

Ejection of Passenger for Failure to Pay Fare of Child.\*—A passenger, although a minor, may be lawfully ejected from a railroad train for failure to pay the fare of a child under her care.

Witnesses—Character—Evidence.—Where a witness has been cross-examined in a manner calculated to impeach his veracity, evidence is admissible to sustain his character.

Harmless Error.—Harmless error is not reversible error.

APPEAL, by plaintiffs from Davidson county circuit court.  
*Affirmed.*

G. W. Sybert and J. B. Daniels, for appellants.

Smith & Maddin, for appellee.

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\*See note at end of case.

## Warfield v. Louisville &amp; N. R. Co

WILKES, J. These actions were for unlawfully ejecting the plaintiffs from the cars of defendant road. They were tried together in the court below and in this court, and there was verdict and judgment in each case in the trial court for the railroad, and the plaintiffs have appealed and assigned errors. The facts, so far as necessary to be stated, are that plaintiff Willie is a negro girl some 15 to 17 years of age, and plaintiff Mary is also a negro girl about 7 years of age. They started from Nashville together to go to St. Bethlehem by way of Guthrie. The girls were accompanied to the station by the mother of the plaintiff Mary, who, it appears, bought a ticket to St. Bethlehem for the older girl, and gave to her some money to pay the fare of the younger one, who had no ticket. When they attempted to get on the cars at Linck's station, in Nashville, the conductor asked for their tickets. Mary's mother stated to him that the younger girl had no ticket, but had money to pay her fare, and the older girl stated that she had the money to pay the fare of the younger one. Upon their statements they were allowed to enter the cars. Soon after the car left the station, the conductor asked for the fare of the younger girl. The elder one gave him all the money she had, and, upon counting it, the conductor found there were only 37 cents. He told her that half fare to Guthrie was 75 cents, and she must either pay that, or both must get off at East Nashville. They were not ejected otherwise than by this statement of the conductor, but, in obedience to it, both left the car at the East Nashville shops, a point within the city limits, near a street-car line and a number of residences. They went to the house of a negro near by, and he carried them back to the home of the Harrington girl, which they reached by 11 o'clock in the morning. Three days later, having in the meantime bought a ticket for the younger one, both girls went over the road to their destination under the same conductor as had the train in charge on the first occasion. The older girl was the aunt of the younger, and the latter was going to visit this aunt, who lived at St. Bethlehem.

Warfield v. Louisville & N. R. Co

hem. The older girl had some money to pay the fare of the younger, and did all the talking to the conductor. The younger had no money or ticket, and said nothing to the conductor. The older girl offered both her ticket and the money she had for the younger girl to the conductor, who declined to receive either. He was not present when they left the car, being engaged at another point on the train. There is some conflict of testimony as to the amount of money the older girl offered for the passage of the younger one, but the weight of the evidence is that she only had half enough to carry her to Guthrie, which was the end of the conductor's run. The jury having passed upon the facts, it is evident they found that the younger girl was in the custody of the older, and that the latter had only half enough money to pay her fare to Guthrie.

Several errors are assigned, but the real question of controversy in the case is whether the conductor had a right to put both girls off the train because the younger one failed to pay her fare, and it was not paid for her.

Instructions.

The court charged the jury that they must determine whether the younger child was in charge and control of the older, and, if so, and she failed to pay her fare, both might be ejected; and the jury must determine how the facts were. It is said that the court should more specifically have defined what was meant by "charge and control," in view of the facts of the case. We think the charge quite clear, and it could hardly have been aided by further statements; but, if so, then additional instructions should have been asked upon the point. *Telephone Co. v. Poston*, 94 Tenn. 696, 30 S. W. 1040.

As to the proposition of law involved, we are of opinion the trial judge was correct. In *Ray, Neg. "Passenger Carriers,"* p. 187, it is said "The failure to pay the fare of a child under the care of a passenger will authorize the expulsion of the passenger;" citing *Railroad Co. v. Hoefflich*, 62 Md. 300; *Gibson v. Railroad Co. (C. C.)*, 30 Fed. 904. *Hutch. Carr.*

Ejection of Passenger for Failure to Pay Fare of Child.

## Warfield v. Louisville &amp; N. R. Co

§ 567c, says, "A person traveling with a child in his custody is liable for the payment of the child's fare, and he may be ejected with the child when he refuses to pay the fare of the latter;" citing *Railway Co. v. Dewin*, 86 Ill. 296. The reason of the rule is apparent. The road is not required to carry the child unless its fare is paid, but it would be contrary to sound policy to expel the child, and leave it alone. If the passenger brings it aboard, or has it in his custody, he becomes responsible for its fare, and the law implies a contract that he will pay it, and look after and protect the child.

It is said it was error to allow evidence to sustain the general character of the witness Corbett, the conductor on the train. This witness was assailed in a severe and searching cross-examination by questions which, in their substance and manner of asking, were calculated to impeach his veracity, and question his truthfulness. Under such circumstances it was proper to allow evidence to sustain his character. *Richmond v. Richmond*, 10 Yerg. 343-345.

The insistence of the counsel for plaintiff that the older girl could not be ejected for failing to pay the younger one's fare unless she had expressly bound herself to become responsible therefor, is not well taken. If the older one has the younger one in her charge and control, she is, by law, responsible for its fare, or liable to be ejected with the younger one for failure to pay the same; and it does not change the rule if both parties are minors.

It is said that it was error to charge that the burden of proof was upon the plaintiff to establish by a preponderance of the evidence every allegation contained in this cause.

**Harmless Error.** We concede that this language is too broad, but are of opinion that the jury construed it to mean that the plaintiff must make out by proof every allegation necessary to establish their case. The defendant afterwards asked the court to charge that the burden of proof was on the plaintiffs to establish by a preponderance of the

## Braun v. Northern Pac. Ry. Co

evidence all material facts necessary to sustain their case, and among them is the question whether or not Willie Warfield tendered sufficient money to pay the little girl's fare to Guthrie, and this was given. We think that, taking these charges together, the jury could not have been misled, and that the latter lays down a correct rule of law. Upon the whole record, we have not been able to find any reversible error, and the judgment of the court below is affirmed, with costs.

## NOTE.

**Ejection of Passenger for Nonpayment of Child's Fare.**—A passenger is responsible for the fare of a child under his charge, and upon refusal to pay the same may, together with the child, be ejected from the train, although he had paid his own fare. Philadelphia, W. & B. R. Co. v. Hoeflich, 18 Am. & Eng. R. Cas. 373, 62 Md. 300, 50 Am. Rep. 223; Beckwith v. Cheshire R. Co., 27 Am. & Eng. R. Cas. 192, 143 Mass. 68, 8 N. E. Rep. 875; Lake Shore & M. S. R. Co. v. Orndorff, 55 Ohio St. 589, 38 L. R. A. 140. See also Austin v. Great Western R. Co., L. R. 2 Q. B. 442; Cox v. Los Angeles, 109 Cal. 100, 41 Pac. Rep. 794; Gibson v. East Tenn., V. & G. R., 30 Fed. Rep. 904.

A father is not responsible for the acts of an adult son with whom he is traveling; and if the son be guilty of misconduct justifying his expulsion from the train, this will not justify the conductor in ordering the father to leave, or in ejecting him. Louisville & N. R. Co. v. Maybin, 66 Miss. 83, 5 So. Rep. 401.

## BRAUN

v.

## NORTHERN PAC. RY. CO.

*(Supreme Court of Minnesota, May 9, 1900.)*

**Duty of Passenger to Pay Fare of His Minor Child.**\*—The law implies a contract on the part of a parent who enters a railroad train with a child *non sui juris*, and subject to payment of fare, to pay the fare of such child.

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\*See Warfield v. Louisville & N. R. Co. (Tenn.), *ante*, and *note*.

## Braun v. Northern Pac. Ry. Co

**Same—Right to Eject.**—If he refuse to pay such fare, both may be expelled and removed from the train, even though the parent tenders payment of his own fare.

**Same—Same—Return of Fare.**—The forcible ejection and removal of a child of tender years from a railroad train on which it has taken passage with its parent, for the failure of the parent to pay the child's fare, is, whether rightful or wrongful, in effect the ejection and removal of the parent. If, in such case, the parent has paid his own fare before the removal of the child, such fare, or the unearned value thereof, must be returned, or offered to be returned, as a condition precedent to the right of removal.

(Syllabus by the Court.)

**APPEAL** by defendant from Ramsey county district court.  
*Affirmed.*

*C. W. Bunn, J. H. Mitchell, Jr., and L. T. Chamberlain,*  
for appellant.

*Stevens, O'Brien, Cole & Albrecht and Moritz Heim,* for  
respondent.

**BROWN, J.** This action is one to recover damages for the alleged wrongful expulsion of plaintiff and his infant son from one of defendant's passenger trains on August 7, 1898.

**Case Stated.** The facts are as follows: On August 5, 1898, plaintiff applied to a railroad ticket agent at Cleveland, Ohio, for through railroad tickets from that city to Hebron, in the state of North Dakota, for himself, wife, four children, and two adult persons, not members of his family. What occurred between him and the ticket agent is best disclosed by the evidence, as follows: "Q. Well, did you have any talk with this man before you bought the ticket? A. Yes. Q. Now tell us, slowly, what that talk was, so all these gentleman will understand you. A. I come to the office, and ask what it cost,—a ticket to North Dakota, Hebron; one ticket. He tell me it cost \$29,—one ticket. Q. He told you \$29, the price of the ticket? A. Yes; one ticket. And he says when I buy more tickets I get cheaper. And I tell him I got four small children, and I and my wife and two girls, and he says— Q. He says what? A. He says, 'I give you four tickets for the whole

Braun v. Northern Pac. Ry. Co

family, for the whole eight persons, and you pay me for every ticket \$27.25.' And I say, 'All right,' and I give him \$109, and put my name, and he gave me four tickets. Q. Was anything said between you about the ages of the children? A. No, nothing. I ask him before I buy the tickets, 'I got four small children.' He ask me how old the oldest one. I told him eight years. He says: 'All right. He pay nothing.' The tickets were delivered to plaintiff, and he at once started on his journey with the members of his party, reaching St. Paul on the morning of August 7th. The agent of whom such tickets were so purchased was an agent of the Nickel Plate Railroad Company, but was authorized to sell through tickets over connecting lines between Cleveland, by way of and over defendant's line, to said Hebron, N. D. As stated, plaintiff's party consisted of four adult persons and four children. Among the children was a boy of the age of eight years. Plaintiff obtained no separate ticket for the boy, and had no written evidence that he was entitled to passage with the other members of the party, but plaintiff claims that his right of passage was covered and secured by the contract with the Cleveland agent under which the tickets were purchased. Counsel for defendant do not question the authority of this agent to sell the tickets to plaintiff, nor the validity of the tickets. But they do question and contest the validity of the alleged contract for the passage of the boy without payment of fare. They insist that the authority of the Cleveland agent was limited to selling tickets, and that he had no authority or power to contract for the transportation of children without tickets, nor to agree for the defendant company that children over 5 years of age should be carried free. Defendant's passenger rates and instructions to agents were offered and received in evidence, from which it appears, among other things, that children under 12 and over 5 years are required to pay half-fare rates for tickets or transportation. Whether the Cleveland agent had authority to make a contract, binding on defendant, for the transportation of plaintiff's boy free,—for such is the



## Braun v. Northern Pac. Ry. Co

result of the transaction shown by plaintiff's testimony,—is a question clothed in much doubt, and is difficult of solution. We are not agreed on the subject. And as another feature of the case, presented by the pleadings and evidence, renders a decision of the question unnecessary, we pass it without discussion. The evidence tending to prove such contract may be referred to upon the question whether plaintiff entered defendant's train with his boy, and insisted upon his passage without a ticket other than the one he himself possessed, in good faith, and without wrongful intent to defraud the company; and it was proper for the consideration of the jury on the question of damages. While we differ on the question of the authority of the Cleveland agent to enter into the alleged contract for the free transportation of the boy, we are agreed that plaintiff's recovery should be sustained on the rule laid down in the case of *Wardwell v. Railway Co.*, 46 Minn. 514, 47 Am. & Eng. R. Cas. 482, 49 N. W. 206, 13 L. R. A. 596.

Plaintiff and his party entered one of defendant's trains on the morning of August 7, 1898, at St. Paul, to continue their journey to Hebron. Before arriving at Minneapolis, the conductor or ticket collector in charge of the train took up their tickets, and returned in place thereof conductor's checks or tickets, the precise nature of which is not shown by the evidence; but we may assume, basing such assumption upon a common knowledge of the custom of railroad companies in such matters, that the tickets or checks returned to plaintiff were the ordinary checks given by conductors, and entitled the plaintiff to passage on that day and train only. On discovering that plaintiff's 8 year old son had no ticket, the conductor demanded that his fare be paid, or that he leave the train. Plaintiff refused to pay the fare, claiming that he was entitled to free passage under the contract with the Cleveland agent. The conductor refused to recognize such contract, and ejected the boy from the train as it was leaving the station at Minneapolis, but did not return, or offer to return, to plaintiff his ticket. The train was in motion at the time, but the boy was in no way injured. Upon the

## Braun v. Northern Pac. Ry. Co

expulsion of his son, plaintiff left the train, and remained with him. Before doing so, he handed to his wife the conductor's checks or tickets given him in lieu of his tickets, and she continued on her journey with the other members of the party. Plaintiff and his son resumed their journey some four days later. It is conceded that plaintiff had a ticket entitling him to passage on defendant's train to Hebron, and it may be conceded that his son, who was of fare-paying age, had no ticket and no right to a free passage; and we have for consideration the question whether the expulsion of the son from the train for the failure of the father to pay his fare, without first having returned, or offered to return, the latter's ticket, was a violation of the contract to carry the father to his destination, or such a wrong as to render it liable in damages. The father having entered the train with his son, who, as we have noted, was but 8 years old, and having refused to pay his fare when demanded, the defendant had the lawful right to eject them both from the train.

Duty of Passenger to Pay Fare of His Minor Child.

Beckwith v. Railroad Co. (Mass.), 27 Am. & Eng. R. Cas. 192, 8 N. E. 875; Railroad Co. v. Orndorff (Ohio), 45 N. E. 447, 38 L. R. A. 140, and cases cited in the note. This is on the theory that, as the parent is in charge of the child who is *non sui juris*, the law implies a contract on his part to pay the child's fare, and, on his refusal to do so, both may be expelled from the train. Railroad Co. v. Hoeflich, 28 Am. & Eng. R. Cas. 373. There is no claim that plaintiff was personally expelled or removed from the train, or that he was requested or ordered to get off. The contention on his part in this respect is that the forcible removal of his son was, under the circumstances, a justification for his leaving the train, and, in effect, his removal as well as the removal of the son. Counsel for defendant conceded on the argument that, if the removal of the son was wrongful, it would operate as the removal of the father, but contended that, if the removal of the son was rightful, then such removal would not operate as the removal of the

## Braun v. Northern Pac. Ry. Co

father. We cannot concur in this latter contention. The reason for the rule that the expulsion of the child operates as an expulsion of the parent is the same, whether applied to a case where the child may be lawfully and rightfully removed, or to a case where such removal is wrongful. The reason for the rule is found in the laws of humanity and nature. It is the parent's duty to care for and protect his child. There is an inseparable bond of unity between them. And to hold that where the child is forcibly removed and ejected from a railroad train in a strange city, among strangers, whether rightfully or wrongfully, the act of the parent in following the child is purely voluntary on his part, and that such removal of the child is not in effect the removal of the parent, would do violence to the sacred relations existing between parent and child, and the laws of humanity and nature. In such case the departure of the parent from the train is not voluntary in the sense that it is of his own choosing or of his own free will. On the contrary, the act of the railroad company in removing the child is the inducement, the cause, and it would be unreasonable to say that under such circumstances the parent left the train of his own free will. So we conclude that the ejection of a child of tender years from a railroad train for the failure of the parent in charge of and accompanying the child to pay its fare, whether rightful or wrongful, is in effect the ejection and removal of such parent. *Gibson v. Railroad Co. (C. C.)*, 30 Fed. 904.

Same—Right to  
Eject.

It remains to be considered whether the failure of defendant to return to plaintiff his ticket, or its unearned value, renders it liable to him in this action. The complaint is

Same—Same—  
Return of Fare.

broad enough to sustain such recovery, and we believe the question is ruled by the case of *Wardwell v. Railway Co.*, 46 Minn. 514, 47 Am. & Eng. R. Cas. 482, 49 N. W. 206, 13 L. R. A. 596. It is there held that such failure to return the fare actually paid by the passenger renders the company liable. We quote from the opinion in that case: "As precedent to the right to

## Braun v. Northern Pac. Ry. Co

expel him from the train, he [the conductor] should have returned to plaintiff what he was entitled to of the money, and until he did that he had no right to put him off. It is true, he returned it to him immediately after the expulsion. But the wrong had then already been committed, and could not be repaired by doing what ought to have been done before the expulsion." It was not the duty of plaintiff to demand the return of his ticket before leaving the train, but, on the contrary, it was the duty of the conductor of the train to return it, or its equivalent, as a condition precedent to his right to eject him. *Bland v. Railroad Co.*, 55 Cal. 570. Nor is it important or material to the right of action that a ticket was subsequently furnished him, with which he continued his journey. *Wardwell v. Railway Co.*, *supra*. It is not disputed but that defendant's conductor or collector took up plaintiff's ticket, returning to him a conductor's check; and it is not claimed that the original ticket was returned, or offered to be returned, before the boy was ejected. If, as suggested by a member of the court, the original ticket had been canceled by the conductor, and thereby rendered worthless and of no value as an evidence of plaintiff's right of passage on a subsequent train, then it was the duty of defendant to return in lieu thereof its unearned value, or some evidence or token which would answer every purpose of the ticket uncanceled. We are unable to distinguish this case, on principle, from the *Wardwell Case*, and feel constrained to follow and apply the law there laid down. A verdict of \$200 was sustained in that case, and no reason occurs to us why the same amount should not be sustained in this case. We have examined all the assignments of error, and find none of sufficient consequence to warrant a new trial. The charge of the court that the jury might take into consideration the plaintiff's pecuniary condition, in reduction of damages,—for such is the effect of the charge,—was in defendant's favor, and furnishes no ground for complaint. The fact that the instruction on this subject was favorable to defendant was

Felton v. Holbrook

recognized by its counsel, as shown by the exception taken thereto, and no exception was taken because it was adverse to defendant's rights or interests. The order appealed from is affirmed.

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FELTON

v.

HOLBROOK.

*(Court of Appeals of Kentucky, April 26, 1900.)*

**Injury to Passenger—Presumption of Negligence.\***—Where a passenger is injured through the over-turning of the car, a presumption of negligence on the part of the railroad arises; and in an action for such injury, where the defendant railroad has failed to offer any evidence to rebut the presumption, it is not error to assume, in instructing the jury, that the railroad's agents or servants were guilty of negligence.

**Same—Gross Negligence—Punitive Damages.**—In an action for such an injury, where plaintiff pleaded that the accident was the result of gross negligence, it was not error to instruct the jury to award punitive damages if they determined the accident was the result of gross negligence, the court having properly defined such negligence.

APPEAL by defendant from Grant county circuit court.  
*Affirmed.*

*Simrall & Galvin*, for appellant.

*W. W. Dickerson*, for appellee.

PAYNTER, J. The appellee, Holbrook, purchased a ticket for passage from Williamstown to Ludlow over the Cincinnati Southern Railway, which was being operated by the appellant, as receiver. While in the yards of the appellant at Ludlow, near his destination, the car in which he was riding was turned over, and he was thrown from one side of the car to the other, against seats,

Once Stated.

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\*See notes, 16 Am. & Eng. R. Cas., N. S., 126 *et seq.*

## Felton v. Holbrook

etc.; receiving cuts, bruises, strains, etc. It is averred in the petition that the accident resulted from the careless handling of a switch, and by other carelessnesses and wrongs unknown to him, and that the carelessness and negligence were gross. The answer denied that the accident was caused by any careless or negligent act of defendant's agents and servants in charge of the train, in changing a switch or otherwise, but averred that it was caused by an "eccentric" action of the cars, which defendant's agents and servants did not cause, and could not have anticipated or avoided by the utmost care and diligence. Upon the trial of the case the defendant did not attempt to show what caused the accident, or sustain his averment as to the "eccentric" action of the cars; neither did he attempt to show how the accident occurred, or what caused it. He neither gave facts or details which showed what caused the accident, nor did he attempt to show a state of facts (nor did the plaintiff do so) which would exonerate him from liability. No one but his employees could tell what produced the accident, and he, through them or otherwise, refused to speak; and, failing in this, the presumption should be indulged that the accident was the result of the carelessness and negligence of his agents and servants. The familiar rule that negligence is not to be presumed does not apply in all cases of common Injury to Passenger—Presumption of Negligence.

In *1 Jones, Ev.* § 14, it is said: "There is another class of cases against carriers where it is often held that negligence may be inferred from the fact that an injury has happened to a passenger,—as where a car leaves the track, or a stagecoach is overturned, or where there is a collision between trains belonging to the same company,—although if, in proving the injury, facts and circumstances are developed which tend to exonerate the carrier, or to charge the plaintiff with contributory negligence, no presumption of negligence arises." In *Cooley on Torts* (page 663) it is said: "As is well said in a Pennsylvania case, '*Prima facie*, where a passenger,

Felton v. Holbrook

being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the *onus* of disproving it.' This is the rule when the injury is caused by a defect in the road, cars, or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control, as a part of its duty to carry the passengers safely."

The defendant failing to offer any evidence to excuse him from the presumption of negligence, the court could have instructed the jury that the accident was the result of the negligence of his agents or servants, and that the plaintiff was entitled to recover, etc. This being true, he cannot complain at the first instruction, which defined the duty which he owed to a passenger. From the language employed by the court in defining his duty to a passenger, it could not have more than rendered it possible for the jury to conclude that his agents or servants had been guilty of negligence, which was, from the facts of this case, presumed.

It is also contended that the court erred in giving instruction No. 2, submitting to the jury the question of gross negligence, and authorizing them, if they concluded that the defendant was guilty of it, to award punitive damages. The court properly defined "gross negligence," and the jury had before it all the facts connected with the accident, as to when it occurred and the circumstances of its occurrence, and the court was authorized to present it, to determine whether or not the negligence which caused the accident was gross.

We are unable to see that any error was committed to the prejudice of the defendant on trial of this case. The judgment is affirmed.

Same—Gross  
Negligence—  
Punitive Damages.

Beardsley v. New York, L. E. & W. R. Co

BEARDSLEY

.v.

NEW YORK, L. E. & W. R. Co. *et al.*

(*Court of Appeals of New York, March 2, 1900.*)

**Constitutionality of Statute Requiring Railroads to Sell Mileage Books.\***—The statute of New York requiring railroads, under a penalty of \$50.00 to sell a 1,000-mile passenger ticket at a reduced rate is invalid as to railroads existing at the time of its enactment, being in violation of the federal constitution, as construed in *Railway Co. v. Smith*, 173 U. S. 684, 14 Am. & Eng. R. Cas., N. S., 511.

**Issues.**—To raise a constitutional objection upheld in a case cited as controlling, it is not necessary to present the reasoning by which the decision was arrived at in such case, it is being sufficient to call the court's attention to the constitutional provision claimed to be violated.

**APPEAL** by defendant from third department appellate division supreme court. *Reversed.*

*F. B. Jennings*, for appellants.

*H. C. Mandeville*, for respondent.

CULLEN, J. This action was brought to recover the sum of \$50, prescribed by chapter 1027 of the Laws of 1895, entitled "An act in relation to the issue of mileage books by railroad corporations," as a penalty for the defendants' refusal to issue to plaintiff a mileage book entitling the holder to travel 1,000 miles on the lines of their road, as directed by that statute. The complaint alleged the incorporation of the defendant railroad company; that on July 25, 1893, the individual defendants were appointed receivers of the defendant corporation, and have ever since continued to operate its road; that on July 8, 1895, the plain-

Case Stated.

\*See *Smith v. Lake Shore & M. S. Ry. Co.* (Mich.), 8 Am. & Eng. R. Cas., N. S., 496, and *note*, p. 511.



*Beardsley v. New York, L. E. & W. R. Co*

tiff tendered the defendants the sum of \$20, and demanded that they issue to him a mileage book entitling him to travel 1,000 miles, in accordance with the provisions of the statute mentioned; and that the defendants refused to issue such book. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer having been overruled, the defendants, under leave given to them by the court for that purpose, served an answer by which, after reserving and insisting that the complaint did not state facts sufficient to constitute a cause of action, they set up several defenses, which, for the disposition of this appeal, it is unnecessary to detail. By consent the action was tried before the court without a jury. The trial court held that the statute of 1895 embraced within its provisions only intrastate transportation, and was a valid exercise of legislative authority, and rendered judgment for the plaintiff for the amount of the penalty. The judgment was unanimously affirmed by the appellate division, and from the judgment of affirmance this appeal was taken.

There is very little for us to write in this case, for the decision of the supreme court of the United States in *Railway Co. v. Smith*, 173 U. S. 684, 14 Am. & Eng. R. Cas., N. S., 511, 19 Sup. Ct. 565, 43 L. Ed. 858, rendered since the judgment of the appellate

**Constitutionality  
of Statute  
Requiring Rail-  
roads to Sell  
Mileage Books.**

division, has practically foreclosed all discussion on the question of the constitutionality of statutes of the character of the one before us. In that case there was before the court for review a statute of the state of Michigan which enacted that railroad companies, within that state should keep for sale 1,000-mile tickets, valid for two years, at the price of \$20 in the Lower Peninsula, and \$25 in the Upper Peninsula. The supreme court held, through *PRCKHAM, J.*, that the statute was not a valid exercise of the police power of the state, nor of the power of the state to establish maximum prices for the transportation of persons and property, "but an arbitrary enactment in favor of the

*Beardsley v. New York, L. E. & W. R. Co*

persons spoken of [those who were able or willing to purchase 1,000-mile tickets], who, in the legislative judgment, should be carried at less expense than the other members of the community." It was further held that such legislation was a violation of that part of the constitution of the United States which forbids the taking of property without due process of law, and hence invalid. It is not necessary, nor would it be profitable, for us to review the discussion or argument by which that result was reached. It is sufficient for us to recognize the point of the decision, and that the decision is binding upon us. The statute before us cannot be differentiated in principle, and hardly in detail, from that decided by the federal court to be in violation of the constitution of the United States. The provisions of the constitution of Michigan differ from those of the constitution of this state. But the case cited was taken to the supreme court of the United States on appeal from a judgment of the state court. Whether the statute was in conflict with the state constitution or not presented no question of a federal nature, but was one which it was not within the power of the supreme court to review, and so it is stated by JUSTICE PECKHAM. The case did present another federal question,—whether the statute had impaired the obligation of any contract entered into between the state and the railroad company. That question was not considered, and the decision proceeded solely on the ground that the statute was an illegal invasion of the property rights of the company. In obedience to the law as declared by the supreme court of the United States, we must hold the statute of 1895 is invalid as to corporations existing at the time of its enactment.

The learned counsel for the respondent urges that the objection upheld in *Railway Co. v. Smith* was not taken or raised in this case in the courts below. We think this claim is untenable. It is conceded by the respondent that the appellants, in their attack on the sufficiency of the complaint, did object that the statute was in contravention of both the federal and state constitutions, in

Issues.

Beardsley v. New York, L. E. & W. R. Co

that it took the defendants' property without due process of law, but he asserts that the reasoning by which the supreme court arrived at its decision in the case cited was not presented. It was enough that the defendants called the attention of the court to the constitutional provision which it was claimed the statute contravened. The reasoning or argument by which that claim was attempted to be supported is immaterial, and would differ in different minds. The judgment should be reversed, and the complaint dismissed, with costs in all of the courts.

VANN, J. (concurring). This case is necessarily governed by the principles laid down by the supreme court of the United States in *Railway Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. While I do not yield assent to the reasoning of that great court in that case, I am compelled to yield to its power, and vote for reversal, but not for a dismissal of the complaint. As the action of the courts below was in accordance with the law of this state as it was, apparently if not actually, when they acted, the reversal should be with leave to the plaintiff to apply at special term for permission to discontinue without costs, on the ground that the further prosecution of the action has been made impossible by a controlling decision not rendered by a court of this state. *De Barante v. Deyermant*, 41 N. Y. 355; *Cole v. Rose*, 65 How. Prac. 520; *Wellington v. Claason*, 9 Abb. Prac. 175; *Winans v. Winans*, 6 N. Y. St. Rep. 813; *Honeywell v. Burns*, 8 Cow. 121; *Hart v. Storey*, 1 Johns. 143; *Merritt v. Arden*, 1 Wend. 92; *Van Buren v. Fort*, 4 Wend. 208; *Lackey v. McDonald*, 1 Caines, 116; *Labron v. Woram*, 5 Hill, 373; *Camp v. Gifford*, 7 Hill, 169.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, and WERNER, JJ., concur with CULLEN, J. VANN, J., concurs in result, in memorandum.

Judgment reversed, etc.

International & G. N. R. Co. v. Best

INTERNATIONAL & G. N. R. Co. *et al.*

*v.*

BEST *et al.*

(*Supreme Court of Texas, Feb. 12, 1900.*)

**Authority of Conductor to Grant Stop-Over Privileges.\***—The M. railroad sold plaintiff a ticket over its own road and that of the I. company. The ticket, which was signed by plaintiff, stipulated that no stop-over would be allowed, and stated that no agent or employee had power to modify the contract in any particular. A conductor of the I. company told plaintiff he might stop over at a point on such road. Subsequently, plaintiff was ejected from a train of the M. railroad, because it was manifest he had not made a continuous journey. *Held*, that the negligence of the conductor in causing plaintiff to believe he could make such stop-over without forfeiting his right to passage upon the remaining portion of the ticket was not the negligence of the I. company, and it was not liable for such ejection, and there could be no recovery against it.

QUESTION certified from court of civil appeals of Fifth supreme judicial district. *Answered in defendant's favor.*

*N. A. Sledman and Morris & Crow*, for appellant.

*Alexander, Clark & Thomson*, for Missouri, K. & T. Ry. Co. of Texas.

*Kearby & Muse and O. N. Brown*, for appellee Best.

WILLIAMS, J. The questions and statement below are submitted by the court of civil appeals for the Fifth district:

"This suit was instituted against the International & Great Northern Railroad Company and the Missouri, Kansas & Texas Railway Company of Texas for the recovery of damages on account of wrongful ejection from the train while a passenger, etc. Upon the trial the court instructed a verdict for the Missouri, Kansas & Texas Railway Company,

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\*See note at end of case.

International & G. N. R. Co. *v.* Best

and submitted the case as to the International & Great Northern Railway Company. A verdict was rendered in favor of the former company, as directed by the charge, and against the latter company for \$250. The International & Great Northern Railway Company has appealed. The facts of the case are undisputed, and are, in substance, these: November 4, 1897, the agent of the Missouri, Kansas & Texas Railway Company of Texas, at Dallas, sold Mr. Best a round-trip coupon ticket over that road and the International & Great Northern Railway from Dallas to San Antonio and return. The ticket contained two coupons for each road,—one for the going trip and one for return over each road. The coupons showed that the trip was to be made over the Missouri, Kansas & Texas Railway from Dallas to Taylor, and over the International & Great Northern Railway from Taylor to San Antonio. The ultimate limit of the ticket was fixed by its terms to November 15, 1897. It provided for a continuous trip going, from the date of the ticket, and for a continuous trip returning, from the date when the ticket should be stamped by the agent of the International & Great Northern Railway at San Antonio, which was made essential by its terms, to the validity of the return part of the ticket. It further stipulated that no stop-over would be allowed, unless specially provided for, and expressly stated that no agent or employee had power to modify the contract in any particular. This contract was duly signed by Mr. Best. Mr. Best made his trip to San Antonio, and on November 7th had his ticket stamped at San Antonio by the agent of the International & Great Northern Railway, and took a train to return to Dallas. The conductor of the International & Great Northern train, while taking up tickets of passengers, asked Mr. Best if he desired to stop over at Austin,—situated on that road, between San Antonio and Taylor. Mr. Best informed him that he would like to make the stop-over if it could be arranged so that his ticket would be good, after the stop-over, from Austin to Dallas. The conductor wrote on the International & Great Northern

## International &amp; G. N. R. Co. v. Best

coupon: 'Off at 67. Reed,'—and told Mr. Best that it was all right, and that he could make the stop-over. Mr. Best did stop over at Austin, and next day resumed his journey. He was carried by the International & Great Northern Railway to Taylor; his International & Great Northern coupon being taken up by the conductor; the remaining part of the ticket bearing no evidence of a stop-over privilege. At Taylor he took the Missouri, Kansas & Texas train, the conductor of which refused to honor the ticket because it was manifest that a continuous journey had not been made from San Antonio from the date of the stamping of the ticket at that place. Mr. Best, declining to pay his fare from Taylor to Dallas, was ejected from the train at Lorena, and, remaining at that place for another train, paid his fare from that point to Dallas next morning. The International & Great Northern Railway did not ask any recovery against the Missouri, Kansas & Texas Railway in the event the plaintiff recovered against it, and appellee Best has not appealed from the judgment. The charge of the court authorized a recovery of damages against the International & Great Northern Railway on account of his ejection from the train of the Missouri, Kansas & Texas Railway Company, including compensation for mental and physical suffering, if the jury determined that the conductor of the International & Great Northern Railway was guilty of negligence in his acts relating to the matter of plaintiff stopping over at Austin, and this negligence was the proximate cause of his ejection from the train of the Missouri, Kansas & Texas Railway Company.

"Question 1. Assuming that the conductor of the International Railway caused the passenger to believe that he could stop over at Austin without forfeiting his right to passage upon a ticket from Austin to Dallas, and that this was negligence in the conductor, which caused plaintiff to stop over at Austin, resulting in his expulsion from the train of the Missouri, Kansas & Texas Railway Company next day on account of forfeiture of the ticket by such stop-over, would

International & G. N. R. Co. v. Best

the International & Great Northern Railway be liable for damages caused by such ejection from said train, including compensation for mental and physical suffering?

"Question 2. Could the International & Great Northern Railway, under the circumstances stated, be held liable for anything further than the loss of the value of that portion of the ticket which was forfeited and rendered valueless by the stop-over at Austin?"

We answer that the facts stated show no right of recovery against appellant. The ticket constituted the contract between the two railroad companies and the passenger, and, by its terms, restricted the right of appellee to a continuous trip from San Antonio to Dallas, and notified him that no agent or employee had power to modify such contract. Negligence of the conductor in representing the contract to confer a right which on its face it plainly denied cannot be held to be the negligence of appellant, since his act was unauthorized. Appellee could not properly rely on such representation as being within the apparent scope of the conductor's authority, for the reason that the contract itself plainly showed that no such authority existed. It could be properly held, under the authorities, that such act or representation did not bind appellant even to carry appellee over its own road after he had broken his trip by stopping at Austin. *Petrie v. Railroad Co.*, 42 N. J. Law, 449; *Railroad Co. v. Henry*, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318. The authority relied on by appellee (*Tarbell v. Railway*, 24 Hun, 51, cited in 5 Am. & Eng. Enc. Law, 602, note) does not conflict with the proposition stated. In that case the plaintiff acted upon the assurance of a train agent, who had authority to grant stop-over tickets, that he could get off the train on which he was traveling, and complete his journey upon another, using the same ticket. The agent acted within the scope of his authority, and it was upon this the decision was based. But, if it could be assumed that appellant's conductor had authority to bind it to carry plaintiff upon another of its trains, this would furnish no ground for going further

## Note

and holding that he therefore had authority to bind his principal to an undertaking that plaintiff should be carried over the other road, contrary to the express contract of such road with plaintiff. The plaintiff was bound to know the meaning of his own contract, and had no right, against its provisions, to act upon the assurance of the conductor.

## NOTE.

**Stop-Over Privileges—Agreement with Agent.**—Where a passenger gets off at an intermediate station on the assurance of the train agent that he may resume the journey on the next train upon the same ticket, the company is bound thereby, and cannot deny the authority of the agent to give such an assurance. *Tarbell v. Northern C. R. Co.*, 24 Hun (N. Y.).

In such case the agent was in control of the train; he was the officer of whom passengers should inquire as to what they might do in respect to the journey according to the rules of the company; and it was within the scope of his apparent authority to tell plaintiff what would be the effect of his getting off the train. *Tarbell v. Northern C. R. Co.*, 24 Hun (N. Y.) 51.

Plaintiff purchased a ticket stamped "Good for this day only," but was told by the local agent that the conductor would give him a stop-over check. *Held*, that conductor, when informed of the promise of the agent, could not expel him without first returning the excess of the fare, or deducting it from the amount demanded for the rest of the journey, though the rules of the company prohibited stop-over privileges on such tickets. *Burnham v. Grand Trunk R. Co.*, 63 Me. 298.

If the passenger asks the proper conductor for a stop-over ticket, and, through the conductor's fault, receives instead thereof only a trip check, the second conductor may still demand of him the additional fare, and, upon his refusal to pay it, may eject him from the train. *Yorton v. Milwaukee, L. S. & W. R. Co.*, 6 Am. & Eng. R. Cas. 322, 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. Rep. 482.

Plaintiff was riding by virtue of a ticket that did not give him the right to discontinue the passage. Having stopped at an intermediate point, and having entered another train, he claimed the right to continue his journey on such ticket, under permission given by a conductor of the first train. Refusing to pay his fare, he was put off, it appearing that only train agents had the power to modify the force of such tickets. *Held*, that such expulsion was



## Note

justifiable, although, at the trial, plaintiff testified that it was, in point of fact, a train agent and not a conductor who had given him the privilege claimed. *Petrie v. Pennsylvania R. Co.*, 1 Am. & Eng. R. Cas. 258, 42 N. J. L. 449.

Passengers are not presumed to know the rules and regulations of a company, made for the guidance of conductors and other employees, relating to stop-over privileges and other internal affairs of the company; and unless a passenger has actual knowledge thereof, or there is notice printed on his ticket that stop-over check is necessary, he is entitled to rely upon representations of the ticket agent as to what is necessary. *New York, L. E. & W. R. Co. v. Winters*, 52 Am. & Eng. R. Cas. 328, 143 U. S. 60, 12 Sup. Ct. Rep. 356.

The fact that one conductor allowed a passenger stop-over on a through ticket, on a part of the route, did not entitle him to it on another part of the road, with a different conductor. *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 3 Am. Ry. Rep. 435.

A rule of a company required conductors so to indorse tickets if a passenger desired to stop off at an intermediate point. Plaintiff, a passenger, asked a conductor so to indorse his ticket, but was told that it was not necessary, and stopped off. He got on a later train and rode to another station and again stopped off, without applying to the conductor to have his ticket indorsed. On attempting to resume his journey on another train his ticket was refused. *Held*, that the privilege granted by the first conductor to stop off without having his ticket indorsed did not extend to other times, and after stopping off once he became subject to the company's rule and should have had his ticket indorsed. *Denny v. New York C. & H. R. R. Co.*, 5 Daly (N. Y.) 50.

A passenger purchased a coupon ticket over several connecting lines, and was informed by the agent that the ticket was good for six days, and would permit him to stop off. He accordingly stopped off at M., and afterwards, before the expiration of the ticket's limitation, proceeded to S., the terminus of one of the roads over which a coupon attached to his ticket entitled him to ride. After leaving S., and while on the road to H., over a different road but operated by the first road, he tendered his ticket to the conductor, who was the same as on the train from M. to S. The conductor refused the ticket, and ejected the passenger from the train. He afterwards boarded another train, and his ticket was accepted. He thereupon brought suit for trespass against the road which sold him the ticket. *Held*: (1) that through tickets in the form of coupons, entitling the holder to pass over successive roads, are regarded as distinct tickets for each road, sold by the agent of the first company as agent for the others; (2) that when such a ticket has been purchased in good

## Louisville &amp; N. R. Co. v. Blair

faith from an agent acting within the general scope of his employment, it is the duty of the several companies named therein to honor it until it is used or expires by its own limitation; and such company is bound by the representations of the agent as to stop-over privileges; (3) that the evidence was sufficient to warrant the jury in finding that the company selling the ticket was the agent for the other company, and that the ticket was good and the passenger wrongfully ejected; (4) that testimony that the train from which the passenger was ejected was the same train, in charge of the same conductor, which carried the passenger on defendant's road, and that the defendant company claimed the proportion of fare on plaintiff's ticket as afterwards accepted, over the road where he was ejected, is evidence sufficient to be submitted to the jury that defendant company was operating the other road, and that the alleged trespass was committed by an employee of defendant company. *Young v. Pennsylvania R. Co.*, 28 Am. & Eng. R. Cas. 114, 115 Pa. St. 112, 7 Atl. Rep. 741.

## LOUISVILLE &amp; N. R. CO.

v.

## BLAIR.

*(Supreme Court of Tennessee, Jan. 27, 1900.)*

**Setting Aside Verdict—Statute.**—A statute providing that a third verdict shall not be set aside upon the facts is not applicable, where the second verdict was not set aside upon the facts but upon surprise over the introduction of evidence.

**Appeal—Review.**—Where there is a rule shown in the record requiring the grounds of complaint to be set out on the motion for a new trial, no errors will be considered on appeal that were not set out in such motion in the court below.

**Ejection of Passenger—Unstamped Ticket—Entering Car on Invitation of Conductor.**—Plaintiff exhibited to the conductor an unstamped return ticket which had on its face a printed provision requiring it to be stamped to be available for a return passage, and was told by him that it was all right, and that was the proper train, but, after he had entered the car under this invitation, he was ejected because the ticket was unstamped. *Held*, that plaintiff could not be rightfully ejected for such cause after accepting such invitation,

## Louisville &amp; N. R. Co. v. Blair

whether or not the conductor had authority to waive the stamping provision.

**Same—Excessive Verdict.**—For the wrongful ejection of a passenger, but in a proper manner, where his loss was only one day's time and \$2.00 or \$3.00 in money, a verdict of \$400 is excessive.

**APPEAL** by defendant from Davidson county circuit court.  
*Reversed.*

*Smith & Maddin*, for appellant.

*J. L. Watts* and *J. B. Daniel*, for appellee.

**WILKES, J.** This is an action for damages for ejecting the plaintiff from the train of the defendant company. There was a trial before the court and a jury, and a verdict for \$800, \$400 of which was remitted, and for the balance judgment was rendered, and the railroad company has appealed.

It is insisted that this verdict cannot be disturbed, because two verdicts have been already set aside, and, under Shannon's Code, § 4850, a third verdict cannot be set aside upon the facts. We are of opinion the second verdict in this case was not set aside upon the facts, but upon surprise on part of defendant over the introduction of the evidence of the witness Pirtle by the plaintiff. The provisions of the section referred to are not, therefore, applicable.

It is a little difficult to know exactly what assignments of error are before this court except two; one that there is no evidence to support the verdict, and the other that the damages are excessive. These assignments present perhaps all that is meritorious in the case. The second and third assignments originally made appear to have been withdrawn in a later assignment, which substitutes for them a different statement and assignment. But it appears that this latter assignment was not embraced in the motion for a new trial in the court below. There is a rule of that court, which is copied into the record, which requires the grounds of complaint to be set out on the motion for a new trial. It has been held by this court that, where such a

**Case Stated.**

**Setting Aside  
Verdict—statute.**

**Appeal—Review.**

Louisville &amp; N. R. Co. v. Blair

rule exists, and is shown in the record, as it is here, no errors will be considered in this court that were not set out in the motion for a new trial in the court below. There was no complaint of the charge of the court upon the motion for a new trial, and hence none can be entertained here. There was complaint that a certain special request was not given, and error was originally assigned upon this ground, but this was withdrawn by the amended or subsequent assignment, and is not, therefore, for our consideration. If it were, we are of opinion that it was not error to refuse the request as made. We proceed, therefore, to examine the case under the two assignments referred to of no evidence to support the verdict, and the amount of damages being excessive. The plaintiff in this case bought the return part of a Centennial ticket from Nashville to Guthrie, Ky. It was required to be stamped to be available for return passage. A provision to that effect was printed upon the face of the ticket. The plaintiff says he did not know of this provision. The court charged the jury that if he knew, or had sufficient opportunity to know, of the condition or provision, he would be affected by it. Without approving this ruling, but passing by it as not being objected to, we have the plaintiff in possession of such a ticket, and it unstamped, claiming the right to ride upon it. In the absence of any other fact, we are of opinion that the ticket so bought and attempted to be used conferred no right of passage. There is testimony tending to show that plaintiff went to the train and presented this ticket to the conductor, and was told by him that it was all right, and he was at the right train, and upon the faith of this statement by the conductor he entered the cars. When the conductor came to him for his ticket, he took it, and punched it, and then informed the plaintiff that he could not ride upon it, because it was not stamped; and he was accordingly ejected at the first stop, about 10 miles from Nashville. Now, whether

Ejection of Passenger—Unstamped Ticket—Entering Car on Invitation of Conductor.

Louisville &amp; N. R. Co. v. Blair

the conductor had the right to waive this requirement of stamping the ticket we need not decide. He perhaps had no such right. Still when the plaintiff exhibited his ticket before entering the cars, and was told it was all right, and that was the proper train, and he entered it under this invitation, he could not afterwards be ejected from the train. He was accepted as a passenger. To deny him right of passage under these facts would be a fraud and wrong upon him. It is true that there is a conflict of testimony as to what the conductor said, and a difference as to what he meant by what he did say; but this is settled by the verdict of the jury, and in this court, and under this assignment, we must consider the case from the standpoint of the plaintiff's testimony. We are of opinion, therefore, that there is evidence upon which the verdict can rest, and the plaintiff was not liable to be ejected from the train. In doing so the company was unreasonably enforcing a rule which was ordinarily a reasonable one.

The only remaining question is as to the amount of damages. It is not claimed that there was any indignity offered, nor any rudeness shown, in ejecting the plaintiff. It was done at Edgefield Junction, 10 miles out, and  
Same—Excessive  
Verdict. the first stop of the train. The plaintiff found a lodging place for the night, and was returned to Nashville next morning, free of charge, and, after having his ticket stamped, was carried to his destination. His loss was one day's time and some two or three dollars in money. We are of opinion the amount of the judgment is so excessive as that, under the rule, it cannot be sustained. The judgment is reversed, and cause remanded for new trial.

Spencer v. Chicago, M. & St. P. Ry. Co

SPENCER .

v.

CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Wisconsin, Jan. 9, 1900.*)

**Evidence.**—Verdicts cannot be based upon mere speculation, guess, or conjecture.

**Injury to Passenger—Presumption of Negligence.\***—The mere happening of an accident to a passenger riding on a railroad car does not raise a presumption of negligence on the part of the carrier. There must be evidence tending to show, in some tangible way, that the accident resulted from something connected with the operation of the railroad.

**Same—Same.**—The mere unexplained fact that a stream of water entered the window of a car and injured a passenger is insufficient to raise a presumption of negligence on the part of the carrier.

**Evidence.**—In an action for such an injury, a witness for defendant was properly prohibited from answering whether he knew of the water escaping from a certain tank passed by the car at any time when the valve was not pulled; as there was not sufficient evidence to justify a finding that the water came from such tank, and none of the questions fixed the time of such an unintentional flow of water at or prior to the time of the accident.

**APPEAL** by plaintiff from Walworth county circuit court. *Affirmed.*

This is an action for personal injuries, and the plaintiff appeals from a judgment of non-suit. It appears from the evidence that the plaintiff was a passenger upon the defendant's railway on the 3d day of September, 1895, Case Stated. and was riding upon one of the defendant's trains from the city of Chicago to a station called "Western Union Junction," in Racine county, Wis., on the afternoon of that day. She was riding upon the east or right hand

\*See *McCafferty v. Pennsylvania R. Co. (Pa.)*, 16 Am. & Eng. R. Cas., N. S., 122, and notes, p. 126.

Spencer v. Chicago, M. &amp; St. P. Ry. Co

side of the car, and, the day being warm, the car window was open. She was nearly or quite asleep, with her head leaning back against the back of the seat, when a stream of dirty water came through the open window, and struck her on the side of the head with considerable force, and wetting her considerably. Her testimony tended to show that the water penetrated her ear, and caused serious trouble thereafter with that organ. The plaintiff herself had no knowledge of where the water came from. But one witness was called who attempted to give any testimony as to the source of the stream of water. This witness was a man named Young, who was also a passenger upon the car. He testified that he saw Mrs. Spencer upon the train, and that when the train was about half way between Chicago and Western Union Junction some water splashed into the open window ahead of him, and on the panes of the other windows along the side of the car; that it was a fair-sized stream, and came with quite a little force, and ran along the whole side of the car; that he could not state positively where it came from; that there was some object or building,—he did not know whether it was a building or object, but it was his impression that it was a water tank, but he could not state positively; that he judged the train was running 40 or 50 miles an hour; that it did not stop between Chicago and Western Union Junction; that he thought it was in the neighborhood of Wadsworth station; that he knew that station was about halfway between Western Union Junction and Chicago, and that the train was nearly halfway from Chicago at the time; that that was all he knew that would connect this accident with the proximity of Wadsworth; that he knew that Wadsworth is nearly halfway between Western Union Junction and Chicago; that his impression was that it was somewhere about halfway between Chicago and Western Union Junction, and that, if Wadsworth is about halfway, it might have been at Wadsworth; that he did not know that he saw a structure, and could not state whether it was a water tank, building,

## Spencer v. Chicago, M. &amp; St. P. Ry. Co

or what it was; that when the water struck the window it attracted his attention, and he turned in that direction, but not quick enough to ascertain what shape or where the water came from; that he could not state positively; that he remembered they were passing through a town, or some little village, or near a station; that he could not swear there was a station near that car at the time the water came in; that he had no personal knowledge as to what town it was, or what the structure was; that he had the impression that about that time they passed some kind of a structure, and that was as far as he could go. It appeared in the evidence by the examination of other witnesses that the station called "Wadsworth" is 19 miles south of Western Union Junction, and is a place of about 200 inhabitants, and that it is nearly 43 miles from Chicago; that the railroad was a double-track railroad, the trains going north using the east track; that there are two water tanks at that station, the north tank being about 150 feet from the station building. It was stipulated that the only water tanks on the east side of the defendant's track from Deerfield, in the state of Illinois, to Western Union Junction, in the state of Wisconsin, are at Wadsworth, Ill., and that Deerfield is 23.8 miles from Chicago, and that this was the situation in September, 1895.

*Fethers, Jeffries, Fifield & Mouat*, for appellant.

*H. H. Field, C. B. Sumner, and J. V. Quarles*, for respondent.

WINSLOW, J. (after stating the facts). It seems entirely plain that the impression of the witness Young that the train was passing a structure of some kind at the time the water came in the car was, at best, a mere conjecture, and that his further idea that such structure might have been a water tank was a conjecture founded upon a conjecture. Verdicts must be founded upon evidence which convinces the mind. They cannot rest on mere speculation, guess, or conjecture. *Hyer v. City of Janesville*,

Evidence.



Spencer v. Chicago, M. &amp; St. P. Ry. Co

101 Wis. 371, 77 N. W. 729. While some of the earlier cases approved the doctrine that the mere happening of an accident on a railway raised a presumption of negligence in favor of the passenger, this doctrine is now abandoned, and it is quite universally held that the evidence must go further, and tend in some tangible way to show that the accident resulted from something connected with the operation of the railway. 2 Fetter, Carr. Pass. § 480; Busw. Pers. Inj. (2d Ed.) p. 184; 2 Shear. & R. Neg. (5th Ed.) § 516. Thus the mere unexplained fact that a missile entered the car and injured the passenger is insufficient. Saunders v. Railway Co., 6 S. D. 40, 60 N. W. 148; Thomas v. Railroad Co., 148 Pa. St. 180, 23 Atl. 989, 15 L. R. A. 416. So we must hold in the present case that the mere unexplained fact that a stream of water entered the window of the car is not sufficient evidence to raise a presumption of negligence on the part of the railroad company.

Error is alleged because of certain rulings on evidence. A witness was called, who worked for the defendant at the Wadsworth station at and prior to the time of the accident, and the question was asked him whether he knew of the water escaping from the north tank at Wadsworth at any time when the valve was not intentionally pulled. An objection to this question as incompetent, immaterial, and indefinite as to time was sustained. This ruling was right for two reasons: (1) Because there was no sufficient evidence to justify a finding that the water came into the car at or near Wadsworth; and (2) because none of the questions fixed the time of such unintentional flow of water at or prior to the time of the accident. Judgment affirmed.

**Injury to Passenger—Presumption of Negligence.**

**Same—Same.**

Chesapeake & O. Ry. Co. v. King

CHESAPEAKE & O. RY. CO.

v.

KING.

(Circuit Court of Appeals, Sixth Circuit, Jan. 22, 1900.)

**Passenger Crossing Intervening Tracks to Platform—Liability of Railroad.\***—Where a passenger alights from a train by direction of the railroad company, or by its implied invitation, at a place where, in order to leave the premises of the company it is necessary to cross intervening tracks, he is constructively still a passenger while crossing such tracks, if he is making his exit over a route habitually used for such purpose by passengers with the knowledge and implied consent of the railroad, and the company owes him the duty of so operating its trains as not to make such exit unnecessarily dangerous.

**Same—Care Required of Passenger.**—A passenger alighting under such conditions may, in the absence of circumstances of warning, be justified in presuming that the trains of the company will not be so operated as to impose upon him the same high degree of care which he would be obliged to exercise if he were not a passenger.

**Questions for Jury.**—There was evidence tending to show that plaintiff was a passenger when injured while crossing intervening tracks after alighting from defendant's train, that she failed to look or listen for approaching trains while crossing; and that a rule of the company requiring the train inflicting the injury to stop before reaching the station was violated. *Held*, that a peremptory instruction for defendant was properly refused.

**ERROR** by defendant to the circuit court of the United States for the district of Kentucky. *Affirmed*.

Only the facts essential to the consideration of the single question upon which a reversal is sought need be stated. The plaintiff below, a young woman, sustained very serious injuries by collision with a railroad train while crossing a railway track which intervened between the station of the company at Central City, W. Va.,

Case Stated.

\*See *Betts v. Lehigh Val. R. Co.* (Pa.), 14 Am. & Eng. R. Cas., N. S., 299; *Graven v. MacLeod* (C. C. A.), 14 *Id.* 305; *Beecher v. Long Island R. Co.* (N. Y.), 12 *Id.* 295, and *notes*, p. 302.

## Chesapeake &amp; O. Ry. Co. v. King

and the nearest public highway or street connecting the village and station. She had taken passage at Ashland, Ky., upon an accommodation train, for Central City, a station east of Ashland. Between Central City and Ashland the tracks are double, and about seven feet apart. The track next the station is used only by east-bound trains, while the other, or northern, track is used only by trains going in the opposite direction. The village of Central City lies wholly north of the railroad tracks, while the station or depot is on the opposite or south side of the railroad. The streets of the town running at right angles with the railroad do not cross its tracks, but extend from them south to the Ohio river. This station house is situated between two streets extending from the railroad to the town, and is about 100 feet from Fourteenth street, which is the nearest of them. Fourteenth street is, therefore, the one used chiefly, if not altogether, by the travel between the depot and the town, and has a pavement or sidewalk only on its western side. The station consists of three connected rooms—a waiting room, a ticket office, and a freight room—extending along the track east and west for a distance of 50 feet. In front of this station is a wooden platform about 6 feet wide. Between this platform and the nearest track is a cinder path, also about 6 feet wide, which extends west beyond the station to a point 7 feet west of the eastern line of Fourteenth street. Persons going from the town to the station and from the station to the town were accustomed to cross the tracks at any point between the station and Fourteenth street, and this mode of going to and from the station, which was only 100 feet east of Fourteenth street, was well known to the railroad company, and was unobjected to. The plaintiff's train stopped as usual in front of the station, and she alighted, as was customary, on the cinder path next the station platform. Following this path to the rear of her train, which had come from the west, she crossed the most southerly track immediately behind the standing train, and diagonally in the direction of Fourteenth street, and continued this diagonal course across the space

*Chesapeake & O. Ry. Co. v. King*

between the two tracks. This diagonal direction threw her back partly towards the direction from which a freight train was approaching. Just as she was crossing the second track, she was struck and seriously injured by a train rapidly passing in a direction opposite to that from which her own train had come. This train approached the station with all the usual and proper signals, and her danger was not observed until too late to avert the accident. The evidence made it clear that she could not have seen the train until after she came out from behind the standing train, and there was also evidence tending to show that the noise made by the standing engine, through escaping steam, was likely to deaden the effect of the signals given by the approaching train, as well as the noise made by its travel. Plaintiff testified that she neither heard nor saw the train which collided with her, and that she was looking from the time she started across these tracks. But it is clear that she did not look in the direction from which the colliding train approached, for it was broad daylight, and after she came out from behind the standing train the approach of a train on the other track from the east could have been seen for half a mile, if she had looked in that direction. There was a rule of the company that all "trains approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the passenger train." There was evidence tending strongly to show that on this occasion this rule was not observed by the train which collided with the plaintiff, and that it passed the standing train, from which plaintiff alighted, while it was still receiving and discharging passengers, at a speed of from 10 to 12 miles per hour. At the conclusion of all the evidence the defendant below asked for a peremptory instruction against the plaintiff upon the ground of her contributory negligence. This was overruled, and is the principal error now assigned. The court submitted the case to the jury upon the theory that the plaintiff was still a passenger while making her egress from the station over the premises of the company to the nearest public

## Chesapeake &amp; O. Ry. Co. v. King

highway, and therefore entitled to a reasonably safe way of exit, and only required to exercise ordinary care in avoiding danger from the movements of trains over tracks which she was obliged to cross in order to make her way to the public street. The charge of the court in respect to the continuance of the relation of a passenger, after safely alighting at the station, and the degree of care incident to such continued relation, was also excepted to, and presents the same question which arose upon the incontestable facts of the case by the motion for a peremptory instruction.

*A. M. J. Cochran*, for plaintiff in error.

*D. W. Steele*, for defendant in error.

Before LURTON and DAY, Circuit Judges, and THOMPSON, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

This case must turn here, as it did below, upon the single question as to whether the defendant in error, at the time she was injured, stood in the relation of a passenger to the railroad company. The insistence of counsel for the company is that when Miss King alighted from the train on the cinder path, between her train and the depot platform, she was in a place of safety, and the relation of carrier and passenger at an end. It is true that when upon the cinder path there was no obstacle between her and the depot platform. But can it be said that she was clear of train and tracks when it was necessary to cross two tracks before she could get off of the company's premises and upon the public highway? The cinder path was on the company's right of way. She might have pursued that path until she reached a point opposite Fourteenth street, and then crossed. That was doubtless the safer course, for it would have given her a clear view of both tracks. But the evidence tended to show that passengers alighting where she did more usually crossed the tracks immediately in front of the depot, or crossed them obliquely in the direction of the head of Fourteenth street,

Chesapeake & O. Ry. Co. v. King

and that any of these ways of going from the station were equally approved by the company. The question as to whether the company had provided a particular way of egress from its premises, or acquiesced in the crossing of its tracks at any point between the station and the head of the public street, was a question of fact submitted to the jury. If it was equally open to her to cross diagonally to Fourteenth street as she did, the question is whether the company was under any obligation to her to so operate its trains that that way off of the company's premises should not be unnecessarily dangerous. If, while making her way from the station to the public street, she was constructively still a passenger, then the company did come under a higher obligation to provide a reasonably safe mode of exit than if she was a mere traveler crossing at a public highway or elsewhere by license of the company. Did the relation of passenger and carrier continue while making her way across these tracks, or did it terminate when she alighted upon a path between which and the public street these tracks intervened? Upon this subject the learned circuit judge instructed the jury as follows:

"But the defendant railway company owes more to a passenger than merely to provide a place to alight. It must provide a place reasonably adapted for alighting on its own grounds, from which there is access to some public highway. While passengers are upon its premises, using that convenient means of access which the company furnishes for passengers to alight and reach the highway, they continue passengers, provided they obey the rules of the company, and use that means of access to the highway from the place of alighting in the manner that the company intends and gives them reason to believe they are to use it."

Upon the subject of the duty of the passenger to use the way of egress from its premises provided for that purpose, the court said:

"Now, if you find that there was a way provided along the track running down to a place opposite Fourteenth

## Chesapeake &amp; O. Ry. Co. v. King

street, and that that was the way which the company intended that their passengers should go, and that this crossing of the track where she did cross it was not with the permission of the company, then the company is not responsible for the accident which occurred by reason of her going a different way from that which was provided; because, you will observe, if she had gone down on the south side of the track to Fourteenth street she would have avoided the danger of crossing the track just behind a train in such a way that she could not have seen the train coming on the other track; but, if the company permitted another way, so that it was well recognized as the way for the passengers to leave the station, by crossing the track directly back of the train, and not going clear down to a point opposite Fourteenth street, then you would be justified in finding that this plaintiff was using a way which the company intended she should use, and was a passenger."

On the same subject the court said:

"Now, if you find that the company permitted the way to be used which was used by the plaintiff in reaching Fourteenth street, then I charge you that she was a passenger, and entitled to that care from the company which passengers under the law have a right to expect. That care is much higher than the care due to a mere traveler crossing the tracks, or to a trespasser on the track."

In respect to the alleged contributory negligence of the defendant in error, the court said:

"Now, was she negligent? Did she do something in crossing that track that a reasonably prudent person would not have done, and which, if she had not done, she would not have been injured? If so, she cannot recover. Of course, you would not have reached this point in the case without finding that she was a passenger. As a passenger she had a right to expect that the company would look after her welfare more than if she were a mere traveler, and so you must consider that relation that she bore to the company in determining whether she was guilty of negligence. How far

## Chesapeake &amp; O. Ry. Co. v. King

she ought to have relied on the company to prevent her injury in this case is for you to determine. Of course, she cannot rely absolutely on that, otherwise she might thus just blindfold her eyes, and wander about there on the passageway provided for her without any regard whatever to whether she would be injured or not; but, on the other hand, it is an element which you are to consider that she had a right to put some reliance on the care of the company. The ordinary rule of a traveler crossing the track is that he must look and listen. That rule, in the case of a passenger crossing the track under these circumstances, is modified by the reliance which he or she is entitled to put upon the care the company will exercise to save him or her from injury. It is for you to judge how much she ought to have relied upon that in this case. If you find that she relied too much on it, and that she ought to have used her senses more, and that, if she had, she would have avoided the injury, then she cannot recover here."

This was a clear and sound exposition of the law relating to the facts of this case, and is fully supported by *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281, 38 L. Ed. 131; *Warner v. Railroad Co.*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; *Graven v. MacLeod*, 14 Am. & Eng. R. Cas., N. S., 305, 35 C. C. A. 47, 92 Fed. 846; *Railway Co. v. Coggins*, 32 C. C. A. 1, 88 Fed. 455; *Browell v. Railroad Co.*, 84 N. Y. 241; *Railroad Co. v. Anderson*, 72 Md. 519, 44 Am. & Eng. R. Cas. 345, 20 Atl. 2, 8 L. R. A. 673; *Railway Co. v. Johnson*, 59 Ark. 122, 26 S. W. 593; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; and *Burnham v. Railway Co.*, 91 Mich. 523, 52 N. W. 14. The case is not distinguishable on principle and is clearly analogous in its facts to that of *Graven v. MacLeod*, decided by this court, and cited above. In that case, Graven, after alighting in safety upon a cinder path between two tracks, left that place of safety, and crossed the track intervening between that place and the street, which crossed both tracks some distance to the right of his point of alighting.



## Chesapeake &amp; O. Ry. Co. v. King

It is true that when he had thus alighted he was not clear of train and track, because one track intervened between him and the public highway. Neither was the defendant in error clear of train and track, for two tracks intervened between her and the only highway by which she could leave the premises. If counsel for plaintiff in error is right in construing the Graven Case as one in which the facts showed that the "act of alighting was incomplete" until Graven reached the outside of the other track, and was clear of it, then the same condition existed in respect to the defendant

Passenger Crossing  
Intervening  
Tracks to  
Platform—  
Liability of  
Railroad.

in error. If a passenger alights by direction of the company, or by its implied invitation, at a place where, in order to leave the premises of the company it is necessary to cross an intervening track, there is an implied agreement that in using that mode of egress from the premises its trains shall not be so operated as to make the exit unnecessarily dangerous. This is the doctrine of the Lowell and Warner Cases, cited above, and is the principle which governed the Graven Case, and which was so well expressed in the charge of the circuit judge below. A passenger alighting under such

Same—Care  
Required of  
Passenger.

conditions may, in the absence of circumstances of warning, be justified in presuming that the trains of the company will not be so operated as to impose on him the same high degree of care which he would be obliged to exercise if he were not a passenger. Neither is this reliance upon the care of the company dependent wholly upon a knowledge of a rule forbidding trains to pass another while receiving or discharging passengers. That rule is but an expression of that decree of care which a passenger would have a right to expect from a railroad company under such conditions. In *Terry v. Jewett*, 78 N. Y. 338-344, it was said that:

"It may be assumed that a railroad corporation, in the exercise of ordinary care, so regulates the running of its trains that the road is free from interruption or obstruction where passenger trains stop at a station to receive and de-

## Chesapeake &amp; O. Ry. Co. v. King

liver passengers. Any other system would be dangerous to human life, and impose upon those who might have occasion to travel on the railroad."

This language was quoted and approved in *Warner v. Railroad Co.*, cited above, where it was said, in speaking of the implied invitation extended by a situation such as that shown in this case, that:

"The railroad, under such circumstances, in giving the invitation, must necessarily be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation; and the passenger, on the other hand, would have a right to presume that in giving the invitation the railroad itself had arranged for the operation of its trains with proper care."

The failure to look and listen before crossing a railway track is negligence *per se* in a traveler at a highway. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Railway Co.*, 114 U. S. 615, 19 Am. & Eng. R. Cas. 353, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; *Railway Co. v. Cody*, 166 U. S. 606, 7 Am. & Eng. R. Cas. 479, 17 Sup. Ct. 703, 41 L. Ed. 1132; *Railroad Co. v. Freeman*, 174 U. S. 379, 7 Am. & Eng. Corp. Cas., N. S., 526, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Blount v. Railway Co.*, 9 C. C. A. 526, 61 Fed. 375; *Railway Co. v. Farra*, 13 C. C. A. 602, 66 Fed. 496. But there is a difference in the degree of care and caution demanded from a traveler crossing a railway at a public crossing and that demanded from a passenger in crossing tracks which intervene between the usual place of alighting from cars and the public highway. In the latter case the company should furnish the passenger with reasonable and adequate protection against accident in the exercise of the privilege of a safe exit from its premises. But such a passenger, in either going to or crossing from the cars, is not absolved from the duty of exercising care and caution in

Trimble v. New York, etc., R. Co

avoiding danger according to the circumstances. The failure of a passenger to look or listen under such circumstances may or may not be negligence, according to the peculiar facts, and is, as held in the cases of *Warner v. Railroad Co.* and *Graven v. MacLeod*, cited above, ordinarily a question of fact for the jury. It was not error to refuse the peremptory instruction asked by the plaintiff in error, and the judgment must be affirmed.

Questions for  
Jury.

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### TRIMBLE

v.

NEW YORK CENT. & H. R. R. CO.

(*Court of Appeals of New York, Feb. 27, 1900.*)

**Appeal—Review.**—On appeal, where a verdict has been directed, all the controverted facts, and all inferences in support of the judgment, will be deemed conclusively established in favor of the party for whom it was directed.

**Carriers of Passengers—Sample Trunks as Baggage—Releasing from Liability—Rules—Authority of Baggage-master.**—A baggage-master stands in the place of the railroad; and a rule requiring baggage-masters to exact a release of liability from commercial travelers, as a condition precedent to checking their sample trunks, is not admissible in evidence, in an action for the loss of such baggage, where the passenger had not been required to sign a release, and had no knowledge of the rule.

**Baggage—Sample Trunks—Notice to Carrier—Sufficiency of Evidence.**—Notice may be given to the common carrier by other means than the direct statement of the owner that he is a commercial traveler, and that his trunk contains samples; and the evidence was sufficient to warrant the trial court, in holding that the carrier had notice that the trunk in question contained samples.

**Same—Same—Right of Action for Loss.\***—Where the carrier has notice that a trunk is a portion of the baggage of a commercial

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\*See monograph by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., 1; *note*, 8 Am. & Eng. R. Cas., N. S., 539 *et seq.*; *Coffee v. Louisville, etc., R. Co.* (Miss.), 14 Am. & Eng. R. Cas., N. S., 423, and *note*, p. 424.

*Trimble v. New York, etc., R. Co*

traveler, and contains samples, and charges extra for its carriage, in case of its loss, the employer of such traveler can recover its value from the carrier.

**Questions of Fact—Submission to Jury—Waiver.**—At the close of the evidence, defendant asked for a nonsuit, which was denied; and then stated that it did not desire to have any question submitted to the jury. A verdict was then directed for plaintiff, to which defendant excepted. *Held*, that defendant's objection that there were questions for the jury could not be heard on appeal.

**APPEAL** by defendant from Fourth department appellate division supreme court. *Affirmed*.

*Albert H. Harris*, for appellant.

*David Hays*, for respondent.

**BARTLETT, J.** This action is brought to recover the value of a trunk and its contents destroyed while in the possession of the defendant, to which it had been delivered by the plaintiff's assignors for transportation from Rochester to New York on the evening of October 23, 1897. Curtis & Wheeler were manufacturers of shoes in the city of Rochester, and Joseph E. Taylor acted as their traveling salesman on the 23d day of October, 1897, and had been in their employ in that capacity for a period of nine years. On the evening in question, Taylor, acting for his employers, went from Rochester to New York on business. Before starting he arranged with the baggageman of the defendant for the transportation of a trunk and an article called a "telescope." The trunk and its contents, consisting of samples of shoes, belonged to Curtis & Wheeler, except a few articles of wearing apparel, the property of Taylor, for which no claim is made. The telescope contained the wearing apparel of Taylor. For the trunk Taylor received from the baggageman a card known as "Excess Baggage Check," for which he paid 85 cents excess of baggage. For the telescope he received the ordinary metallic check. Taylor described the trunk, when a witness at the trial, as a regular sample trunk, made of wood, and covered with canvas, about 32 or 34

Trimble v. New York, etc., R. Co

inches in height, 36 to 38 inches in length, and 22 to 24 inches in width. The "number taker" of the Rochester baggageroom was sworn, and stated that he took a record of the baggage in and out. He produced a sheet containing a record covering October 23, 1897, which showed the description of plaintiff's baggage as a sample trunk. He further testified that he so designated it from its appearance. Taylor testified that he had been in the habit of leaving Rochester with his samples on an average of four, six, or eight times a year for about 12 years. The night checkman was sworn for defendant, and stated that he did not know what the contents of the trunk were, and that nothing was said to him as to the contents. He was asked on cross-examination if he remembered anything about this particular trunk or its appearance. He answered, "I couldn't just now; no." It is to be observed that this witness was not asked by defendant's counsel whether he recognized this piece of baggage as a sample trunk from its external appearance. He does not contradict the number taker as to the external appearance of the baggage showing it was a sample trunk. The defendant does not question receiving the trunk, or the failure to deliver it, but insists it is not liable for its loss, with contents, for the reason that Taylor, when paying for excess of baggage on the trunk, failed to inform the checkman that it contained samples. The learned counsel for the defendant very frankly states in his brief that it is true the trunk was what is commonly known as a "sample trunk," and had the appearance of one, but nevertheless argues that the plaintiff should have been nonsuited.

The liability of common carriers for the loss of sample trunks carried by commercial travelers in the transaction of their business has been frequently considered by the courts of this and other jurisdictions during the last 25 years, and, while the decisions are conflicting, many of them are distinguishable in their facts from the case at bar. The law relating to this subject has been in a state of evolution, and certain rules have finally been laid down in

*Appeal—Review.*

Trimble v. New York, etc., R. Co

this state, calculated to protect the rights of both parties, in view of the fact that a vast amount of the wholesale business of the country is transacted through commercial travelers, to the great profit of the railroad companies and convenience of merchants. As this case is in the position where each party is to be regarded as having requested the direction of a verdict (a point we will discuss later), and the trial judge having directed a verdict for the plaintiff, all the controverted facts, and all inferences in support of the judgment, will be deemed conclusively established in his favor.

The defendant read in evidence certain rules of the company which provide, in brief, that baggage consists only of necessary wearing apparel, limited to 150 pounds in weight; that sample baggage, of not more than 150 pounds, will be checked free for one person, regardless of the number or kind of tickets presented. Rule 4 reads as follows: "Small cases or trunks containing merchandise will be carried as

an accommodation to commercial travelers, and may be checked when release of liability, Form 220, is signed in consideration of its transportation on passenger trains as baggage.

Carriers of Passengers—Sample Trunks as Baggage—Releasing from Liability—Rules—Authority of Baggage-master.

In case personal baggage and samples are contained in same trunk, a release must be signed for samples, and agents will refuse to check the same unless this is done." The release referred to absolves the company from all liability for loss, detention, or damage to the trunk or its contents. It is urged on behalf of the defendant that rule 4 limited the authority of the baggageman, and that he was unauthorized to check a sample trunk without exacting the release. This court has held that the baggage agent stands in the place of the railroad company. *Talcott v. Railroad Co.*, 159 N. Y. 471, 54 N. E. 1. And the record in the case before us shows that no release was exacted, nor was plaintiff's agent aware of the rule. The plaintiff's agent testified that he had on a number of occasions signed this release when he desired to stop at several stations between Rochester and New York, as he could settle for

## Trimble v. New York, etc., R. Co

excess of baggage through to New York for less than to pay this excess from each station at which he stopped. On cross-examination he was asked: "Q. I ask you if you did not know the fact that when the baggagemaster knew that your trunk contained samples, or any other traveling man's trunk contained samples, that this release of liability was executed? A. No, sir; I had no knowledge of that. I knew that I had from time to time executed those releases on my sample baggage." On re-direct examination he was asked: "Q. When you say that you had executed those releases, you refer to the releases which you described before, in order to save paying excess of baggage from each place when you departed? A. Yes, sir; no release was presented to me, nor did I sign any release, nor was I asked to, when I checked this trunk in controversy." The defendant's checkman or baggagemaster does not deny this statement.

This case presents the question whether the baggageman of the defendant, who checked the lost trunk and collected excess of baggage thereon, knew that it was a commercial traveler's trunk, from surrounding facts and circumstances, and defendant was thus chargeable with notice. This court has held that notice may be given to the common carrier by other means than the direct statement of the owner that he is a commercial traveler, and that his trunk contains samples. In *Sloman v. Railway Co.*, 67 N. Y. 208, plaintiff's son, a lad of 18 years of age, was employed by him as traveling agent to sell goods by sample. He had two large trunks containing the samples, different from ordinary traveling trunks, and had a valise for his personal baggage. He delivered the trunks to a baggagemaster at a railroad depot, and, when asked to which station he wished them checked, replied that he did not then know, as he had sent a dispatch to a customer at a certain place to know if he wanted any goods. If not, he desired them to go to a certain other place, where he expected to meet customers. Soon after he checked his baggage, and paid two

Baggage—Sample Trunks—  
Notice to Carrier—  
Sufficiency of  
Evidence.

*Trimble v. New York, etc., R. Co*

dollars for extra weight. JUDGE RAPALLO, in his opinion, said: "It does not appear that it was stated, in terms, to the baggagemaster what the trunks contained; but the jury had the right to consider the surrounding circumstances, the appearance of the passenger and of the articles, the conversation between the passenger and the baggagemaster, and the dealing between them, and, if they indicated that the trunks were not ordinary baggage, or received or treated as such, the jury had the right to draw the inference of notice, and that they were received as freight." In *Talcott v. Railroad Co.*, 159 N. Y. 461, 54 N. E. 1, it appeared that when weighing the trunks the agent of the company observed "they weighed light," and the traveler replied, "Yes; they contain samples of underwear." JUDGE VANN, referring to this incident, in the opinion of the court, at page 471, 159 N. Y., and page 4, 54 N. E., said: "The number and appearance of the trunks was some evidence that they contained merchandise, and the agent was expressly told that they contained samples. In view of the custom proved, that commercial travelers generally carry samples belonging to their employers in their trunks, this warranted the inference that the baggage agent know the exact facts." In the case at bar there were facts warranting the submission of the question to the jury, or the trial judge, as to whether defendant was charged with knowledge of the character of the trunk, through its agent; the external appearance of a regular sample trunk; the readiness with which it was recognized as such by the official "number taker"; the fact that defendant was constantly checking sample trunks on all of its passenger trains except the Empire State Express; the further fact that for about 12 years plaintiff's agent had been traveling on defendant's road with a sample trunk, and leaving Rochester six or eight times a year; the fact that sample trunks were checked for the same compensation as ordinary baggage,—these and any other relevant facts were properly considered when the verdict was directed, and the facts warranted by the evidence stand conclusively established in



Trimble v. New York, etc., R. Co

favor of the plaintiff. While it is doubtless the better practice, as suggested by defendant's counsel, that a traveler in charge of a sample trunk should state to the baggage agent the fact when he seeks to check it, yet if, in the haste of transacting such business, or where, by many repetitions of the act, much is taken for granted, this is not done, it would be a harsh and unreasonable rule that precluded the plaintiff from submitting to the jury the facts surrounding the transaction. The recovery in this case was not on the contract of passage entered into when the plaintiff's agent purchased his ticket, but on an independent agreement for the transportation of the sample trunk as freight. In *Sloman v. Railway Co.*, 67 N. Y., at page 214, JUDGE RAPALLO said: "From all the circumstances, the jury were, we think, authorized to draw the inference that the baggagemaster understood that the agent was traveling for the purpose of selling goods, and that these trunks contained his wares; that he was not entitled to have them carried as his ordinary baggage, and therefore the extra charge was made, and they were carried as freight." In *Talcott v. Railroad Co.*, 159 N. Y., at page 470, 54 N. E. 3, this case was cited and followed. The *Sloman Case* also authorizes a recovery by a plaintiff where this independent contract is made by his salesman as agent. 67 N. Y. 212.

Same-Same-  
Right of Action  
for Loss.

There remains to be considered one other question. The learned appellate division in its opinion stated, in substance, that, as neither counsel raised the point that there were any questions of fact to be submitted to the jury, the effect was to establish the facts, if any there were, in favor of the plaintiff. As the correctness of the practice at the trial is challenged, we will consider the question. At the conclusion of the evidence the defendant's counsel moved for a nonsuit upon various grounds stated by him, which motion was denied. He then asked the court, "What question will your honor submit to the jury?" To this the court inquired, "What question do you desire to submit to the jury?" To which the

Questions of  
Fact-Submis-  
sion to Jury-  
Waiver.

Trimble v. New York, etc., R. Co

defendant's counsel answered, "I do not desire to have any question submitted to the jury." Thereupon the plaintiff's counsel stated that he was willing to leave it to the court, to which the defendant's counsel answered, "I stand on my motion for a nonsuit, of course." The plaintiff's counsel then asked for a direction of a verdict, which was objected to by the defendant's counsel, but was granted by the court. A verdict was directed and an exception taken by the defendant. Neither party asked to have any question of fact submitted to the jury. In the case of *Adams v. Lumber Co.*, 159 N. Y. 176, 53 N. E. 805, O'BRIEN, J., in delivering the opinion of the court, says: "The court directed a verdict in favor of the plaintiffs for the value of the lumber, with damages for its detention, and the defendant excepted. The request by both parties for the direction of a verdict amounted to a submission of the whole case to the trial judge, and his decision upon the facts has the same effect as if the jury had found a verdict in the plaintiff's favor after submitting the case to them. Under these circumstances, the judgment is conclusive with respect to the two facts upon which the right of action depended." To the same effect are the cases of *Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38; *Thompson v. Simpson*, 128 N. Y. 270, 283, 28 N. E. 627; *Koehler v. Adler*, 78 N. Y. 287.

It is contended, however, that as the defendant asked for a nonsuit, instead of a directed verdict, the foregoing cases have no application. It must be borne in mind that in this case, after the denial of his motion for a nonsuit, the defendant's counsel asked the court what question his honor would submit to the jury, and that the court then inquired of him what question he wanted submitted, and he answered that he did not desire any question submitted to the jury. In the case of *Barnes v. Perine*, 12 N. Y. 18, after the evidence had closed, the counsel for the defendant moved for a nonsuit. The motion was denied, and the defendant excepted. The court thereupon, at the request of the plaintiff, directed a verdict in his favor. ALLEN, J., in delivering the opinion of the court,

*Trimble v. New York, etc., R. Co*

said: "If the defendant supposed that there was a disputed question of fact, material to the issue between the parties, he should have made a distinct request that it should be submitted to the jury. But having treated the questions as purely legal, and acquiesced in the disposal of them by the court as such, he cannot now be heard to object that facts were involved which should have been decided by the jury." In *Winchell v. Hicks*, 18 N. Y. 558, the motion was also for a nonsuit at the conclusion of the evidence, which was denied, and a verdict directed in favor of the plaintiff. In that case it was held that the defendant, moving at the conclusion of the evidence for a nonsuit, which is denied, if he desires that questions of fact be submitted to the jury, must distinctly request it, and cannot upon appeal make the point under a general exception to the judge's direction of a verdict. In the case of *O'Neill v. James*, 43 N. Y. 84, there was a motion for a nonsuit, which was denied, and the jury directed to find a verdict in favor of the plaintiff for the amount of the damages sustained. It was held that where a party, upon the trial, rests his case upon certain positions which he calls upon the court to rule in his favor as questions of law arising upon undisputed facts, if he also desires that any question of fact in the case be submitted to the jury, he must make a motion to that effect. In the absence of this, his mere exception to the ruling of the judge that there is no question for the jury is unavailing. See, also, *Ormes v. Dauchy*, 82 N. Y. 443; *Dillon v. Cockcroft*, 90 N. Y. 649. In the case of *Stone v. Flower*, 47 N. Y. 566, the trial court directed the jury to find a verdict for the defendant. The plaintiff, however, had not waived his right to have the questions of fact involved in the case submitted to the jury by any motion on his part for such a direction, and it was held that he was entitled to have his exception taken to the direction of a verdict reviewed; but GROVER, J., in delivering the opinion of the court, refers with approval to *Barnes v. Perine*, *Winchell v. Hicks*, and *O'Neill v. James*, above cited, and distinguishes the case under consideration by him from the rule adopted in those cases. In

*Trimble v. New York, etc., R. Co*

*Clemence v. City of Auburn*, 66 N. Y. 334, and in *Pratt v. Insurance Co.*, 130 N. Y. 212, 29 N. E. 117, relied upon as supporting a different rule, there was no waiver by the appellant, by motion to direct a verdict or for a nonsuit. The cases, cited, of *Dwight v. Insurance Co.*, 103 N. Y. 341, 8 N. E. 654, *Bagley v. Bowe*, 105 N. Y. 171, 11 N. E. 386, and *Bulger v. Rosa*, 119 N. Y. 459, 24 N. E. 853, have no application to the case at bar, as here the proceedings at the close of the trial were, in legal effect, a request by both counsel for a directed verdict. The judgment and order appealed from should be affirmed, with costs.

O'BRIEN, J. (dissenting). This was an action by the assignee of a commercial firm for the loss of a trunk which was carried by the traveling salesman of the firm, and was lost by the defendant. This trunk contained sample merchandise of the character in which the firm dealt, and was put upon one of the defendant's trains by direction of the salesman, who was a passenger from Rochester to New York, on the 23d day of October, 1897. The salesman purchased a passage ticket on the defendant's road from Rochester to New York, which contained the following limitation: "In consideration of extended time within which journey may be begun, holder hereof releases R. R. Co. from all liability as to baggage, except for wearing apparel, not exceeding in value one hundred dollars." The salesman procured the trunk to be delivered at the railroad station, and checked as baggage, paying 85 cents for excessive weight. By the defendant's rules a passenger is entitled to have carried free 150 pounds of personal baggage, and by this rule baggage consists only of wearing apparel and such personal effects as may be necessary for the use and comfort of the passenger while traveling. Baggage in excess of that amount was to be paid for. The rule also provides that sample cases or trunks containing merchandise will be carried as an accommodation to commercial travelers, and may be checked when a release from liability is signed in consideration of its transportation on passenger trains as baggage; and, in case per-

*Trimble v. New York, etc., R. Co*

sonal baggage and samples of merchandise are contained in the same trunk, a release must be signed for the samples, and agents are directed to refuse to check the same unless this is done. The baggagemen by this rule are directed to refuse to check baggage that does not consist strictly of personal effects unless this release is properly filled out and signed by the owner, or the agent of the owner. The form of this release appears in this case, and by its terms the company is discharged from all liability for baggage, whether the same arises from carelessness or negligence, however gross, on the part of the company, or its agents or servants, or from any cause whatever. It appears that the salesman who had the trunk in question had on previous occasions signed these releases, though he stated that he never read them, but that there was no release signed on the occasion of the delivery of the trunk in question, nor did he make known to any of the servants of the company its contents; and there is no evidence in the case to show that the defendant, or any of its servants, on this or any other occasion knew the fact that the trunk carried by this salesman contained merchandise, except as that fact was to be inferred from its appearance. It appears that the salesman had been in the employ of the firm for about 12 years, and during that time had been a passenger upon the defendant's road, but whether the trunk in question had ever seen prior to the occasion in question by any of the defendant's agents or servants at Rochester does not appear. The claim for damages for the loss of the trunk was assigned by the firm to the plaintiff. These are the undisputed facts that appear in the record, and the question is whether the plaintiff was entitled to recover.

At the close of the proofs the defendant's counsel made a motion for a nonsuit on the ground, among others, that there was no evidence that the defendant had any knowledge that the trunk contained merchandise, and that there was no proof of a contract to carry a trunk containing merchandise on a passenger train, and that, inasmuch as the trunk did not contain baggage, there could be no recovery. The motion

*Trimble v. New York, etc., R. Co*

was denied, and the defendant excepted. The defendant's counsel then asked the court what question he proposed to submit to the jury. The court then asked the defendant's counsel what question he desired to submit to the jury, and the counsel replied that he did not desire to have any question submitted. The plaintiff's counsel then stated that he proposed to leave the case to the court, if the defendant's counsel was willing. The defendant's counsel did not accept this offer, but stated explicitly that he proposed to stand on his motion for a nonsuit. The plaintiff's counsel then asked the court to direct a verdict in his favor for the value of the trunk and contents, being \$542.10, and \$35 interest. The defendant's counsel objected to the direction of a verdict for the plaintiff and made a special objection to the allowance of interest, but these objections were overruled. The court then directed a verdict in favor of the plaintiff for \$577.10, and to this direction the defendant's counsel excepted. The questions of law presented by the record are therefore before this court for review.

The plaintiff cannot recover in this case unless he established a contract, express or implied, on the part of the defendant to carry merchandise for the salesman on a passenger train. It is not, and cannot be, claimed that there was any express contract creating the relations of a common carrier of goods between the salesman and the defendant. The only express contract made is represented by the passenger ticket sold to the salesman, and that was a contract to carry him as a passenger, with his personal baggage. But it turned out that what he had in the trunk was goods, and not baggage, which, under the defendant's rules, it did not carry on passenger trains, except in cases where the owner or passenger signed a release for any claim for damages in case of loss from any cause whatever. So that the salesman caused the trunk in question to be placed on a passenger train without any express contract on the part of the defendant to carry or be responsible for it. Moreover, the defendant contends that the salesman caused the trunk to be placed upon

*Trimble v. New York, etc., R. Co*

the defendant's passenger train, against its rules, as baggage, when in fact it was not baggage, but goods. There is but one ground upon which the defendant can lawfully be required to respond for the loss of the trunk and its contents, and that is in case it received and checked the same upon the train with knowledge of the fact that it contained goods instead of baggage. When a passenger who desires to have goods carried with him on a passenger train gives notice of that fact to the carrier, and the latter has notice of the fact in any way, and then receives and checks the trunk containing the goods, the relation of carrier and shipper is created by the transaction, with all its duties and responsibilities. *Sloman v. Railway Co.*, 67 N. Y. 208; *Stoneman v. Railway Co.*, 52 N. Y. 429. But, in the absence of proof showing or tending to show knowledge of the contents of the trunk or package by the carrier in such cases, there can be no recovery, and such knowledge cannot be inferred from the appearance of the trunk or package containing the goods. *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587; *Gurney v. Railway Co.*, 14 N. Y. Supp. 321, affirmed on opinion below in 138 N. Y. 638, 34 N. E. 512; *Cahill v. Railway Co.*, 10 C. B. (N. S.) 154, affirmed in 13 C. B. (N. S.) 818; *Blumantle v. Railroad Co.*, 127 Mass. 322; *Alling v. Railroad Co.*, 126 Mass. 121.

The case, therefore, is solved by a very simple inquiry, and that is whether there is in the record anything showing or tending to show that the defendant had knowledge of the contents of the trunk in question when he received and checked it upon the train on the 23d of October, 1897, other than the appearance of the same, which, it is held, is no evidence of knowledge at all. I confess I am unable to find any. It is said that the salesman was traveling as such for 12 years, but it does not appear that at any time he notified the defendant of the contents of the trunk, or that the defendant at any time acquired the knowledge in any other way, so that the case stands upon the transaction when the trunk was

Trimble v. New York, etc., R. Co

shipped for the last time. A fact or circumstance that in itself proves nothing is not made any stronger when multiplied by 12 or any larger number. In my opinion, there was no proof in the case to warrant a finding that the defendant had notice or any knowledge of the fact that the trunk in question contained goods instead of baggage. But the learned trial judge evidently thought otherwise, and it distinctly appears from the opinion of the learned court below that reviewed the case on appeal that it held that whether the defendant had or had not such notice or knowledge was a disputed question of fact. Grant, for the sake of the argument, that this view is correct; still the disputed fact was not found by the jury, and the action was one at law, triable by jury. Either party had the constitutional right to have the facts determined by the jury. The learned court below held that the disputed fact necessary to support the plaintiff's case was found by the court without the aid of the jury, and that it had the right to take the question from the jury and decide it itself. This is an obvious error, since the doctrine upon which it is based would go far to destroy the right of trial by jury altogether. If sustained by this court, all that will be necessary hereafter, when the plaintiff in an action at law has given proof of some fact or circumstance which no one claims is conclusive in support of an issue of fact, is to request the trial judge to direct a verdict in his favor; and, if such a direction is given against the defendant's objection and exception, still the disputed and necessary fact is to be deemed found by the court. The defendant could not be deprived of the right of a jury trial without its consent. It gave no such consent, nor did its counsel in any way waive the right. He moved for a nonsuit, and excepted to the denial of his motion. He told the court that he had no question to submit to the jury, and obviously he had none, from his view of the case, since he had just contended in his motion for a nonsuit that there was no case for the jury, as there was no proof that the defendant had



*Trimble v. New York, etc., R. Co*

knowledge of the contents of the trunk. He told the court that he stood upon his motion for a nonsuit, and objected and excepted to the direction. How, under such circumstances, he consented to have the facts found by the court, or waived his rights to have them found by the jury, it is impossible to conceive. The defendant's counsel did not need any finding and did not want any finding. All he asked was that his client should be left alone. When his motion for a nonsuit was denied, and he concluded to stand upon that, he had no interest in anything else that took place. But it was quite different with the plaintiff. Before he could have judgment in his favor, it was necessary that the important fact in dispute should be found in his favor, and it was his business to procure the finding in the proper way. The defendant's counsel could remain silent, and let the plaintiff try his side of the case. The plaintiff's counsel should then have gone to the jury, and asked them to find the disputed fact, which was an essential part of his case, and which the other side was not interested in at all. When he asked and accepted the direction of a verdict in his favor by the court, he asked and accepted what he was not entitled to. The learned counsel for the plaintiff cites two cases to show that this practice is correct. *Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38; *Adams v. Lumber Co.*, 159 N. Y. 176, 53 N. E. 805. They have no application to the question here, since it appears that they are cases where both sides asked the court to direct a verdict. All the parties may by such a request clothe the court with power to decide all the questions in the case, but it has never been held that one party could do it against the protest of the other. It is safe to say that no authority can be found to justify the practice followed in this case, and it has been often condemned in this court. The rule that governs the question has been thus stated in this court more than once: "In a case triable by a jury, the direction of a verdict is only justified where the evidence conclusively establishes the right of the party in

Trimble v. New York, etc., R. Co

whose favor it is made." *Bulger v. Rosa*, 119 N. Y. 459, 24 N. E. 853; *Bagley v. Bowe*, 105 N. Y. 171, 11 N. E. 836; *Dwight v. Insurance Co.*, 103 N. Y. 341, 8 N. E. 654. It is not necessary for the party against whom a verdict is directed upon evidence not conclusive to show that he requested to have the case sent to the jury. *Stone v. Flower*, 47 N. Y. 566; *Clemence v. City of Auburn*, 66 N. Y. 334; *Pratt v. Insurance Co.*, 130 N. Y. 212, 29 N. E. 117. It would indeed be a rule of practice bordering on the absurd that would require a defendant in a case where a fact is in dispute, in order to preserve his right to have the fact found by the jury, to assert by such a request that there is evidence tending to prove the plaintiff's case, when, upon a motion for a nonsuit just denied, he contended that there was no evidence whatever. He may preserve his rights by an exception to the direction of a verdict, and without taking two positions before the court so manifestly inconsistent. It is only necessary to add that, if there is in this record any evidence at all of knowledge by the defendant of the contents of the trunk, no one ventures to assert that it was conclusive. The judgment should be reversed, and a new trial granted; costs to abide the event.

HAIGHT, MARTIN, and VANN, JJ., concur with BARTLETT, J., for affirmance. PARKER, C. J., concurs with O'BRIEN, J., for reversal. LANDON, J., dissents upon the ground that defendant having, notwithstanding the denial of its motion for a nonsuit, objected to a direction of a verdict, the court should have submitted the facts to the jury.

Judgment and order affirmed.

## Hedding v. Gallagher

## HEDDING

v.

GALLAGHER *et al.**(Supreme Court of New Hampshire, July 28, 1899.)*

**Carriers of Passengers—Power to Grant Exclusive Privileges to Local Carriers at Stations.\***—Any contract between a railroad and another carrier purporting to confer upon the latter an exclusive right to solicit upon the railroad's grounds the patronage of its incoming passengers, for the furtherance of their journeys beyond the railroad's line, is in violation of the rights of public, and void.

**Same—Same—Reasonable Regulations.**—Such a contract cannot be sustained as an exercise of the railroad's right to regulate such business, so that it may be done in an orderly manner.

**Same—Same—Enforcement.**—As such a contract would infringe a public right which the court would be bound to preserve, it would not be recognized as a foundation upon which to base a decree.

**Same—Same.**—The contention that such a contract could be sustained as an exercise of the right of railroads to make contracts regulating their respective charges is without merit.

**Same—Same.**—The contention that such a contract could be sustained as a mere letting of the use of a portion of the railroads real estate is without merit.

*Defendants' demur sustained.*

*Oliver E. Branch, for plaintiff.*

*Sullivan & Broderick, for defendants.*

PEASLEE, J. The demurrer raises the question of the extent of the right of one who has undertaken a public business to make contracts which tend to infringe public rights. Those who engage in such business thereby surrender certain rights which belong to private persons. The common carrier is not permitted to carry for A., and to refuse to carry for B.

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\*See *Kates v. Atlanta B. & C. Co.* (Ga.), 16 Am. & Eng. R. Cas., N. S., 140 and *foot-note*; *Godbout v. St. Paul Union Depot Co.* (Minn.), 16 *Id.* 821.

## Hedding v. Gallagher

under like circumstances. The innkeeper must, to the extent of his accommodations, entertain all who apply in a proper way. By virtue of their employment, they have impliedly agreed to do these things for all. Their services are public property. Hence it is that, when a question arises which involves their rights or liabilities as to matters touching their duty to the public, the ordinary standards of the rights of private individuals to use their own as they will, or to contract or refuse to contract at their pleasure, afford little or no aid. If one has entered upon such public employment, he must treat alike all who seek to employ his public services. It is equally true that he must accord like treatment to all who, engaging in another and connecting branch of public service, offer their services to those of the public who are temporarily upon his premises. *Markham v. Brown*, 8 N. H. 523. In that case it was decided that an innkeeper, at a place from which travelers habitually continued their journeys, could not discriminate between rival stage drivers as to the privilege of soliciting the patronage of his guests upon his premises. So, here, the solicitation of the patronage of incoming passengers, for the continuation of their journeys, is a privilege to be equally enjoyed by all. The attempt to distinguish the cases upon the ground that travelers commonly journeyed from Hanover in public conveyances, while their baggage is usually carried from the Manchester station in some other way, is conclusively answered by the fact that the carriage of baggage by public conveyance is so extensive that the plaintiff agreed to pay \$100 a year for the mere privilege of soliciting such business upon the railroad's premises. It is also said that "a traveler arriving at his destination upon a railway ceases to be a traveler," and that for this reason *Markham v. Brown* does not apply; and, further, that a railway station is not a hotel where the traveler may stop and claim the rights of a guest. If both propositions were sound, his situation would be a perplexing one. He could not stop and consider himself a

## Hedding v. Gallagher

guest; and if he went on he would not be a traveler, and could claim none of a traveler's rights. The traveler doubtless ceases to be a passenger upon the railroad when he leaves its premises, but how he can cease to travel before he reaches his destination beyond those premises is not readily perceived. And, if he continues to rightfully travel, he would seem to be justified in claiming a traveler's rights. His rights at the station do not terminate the instant he alights from the train. He also has the right to a reasonable time and way to leave the station, and to reasonable facilities for the reception of his baggage by whoever is to transport it further. The carrier's duties relating to a passenger's baggage do not necessarily terminate at the same time with those as to his person. The carriage of baggage is a part of transportation. It is to be expected that when travelers arrive at a railway station they will have more or less baggage to be carried from there. It is admitted that this is so far a part of the reasonable and customary mode of travel that a person who has a previous contract with the passenger has the right to come upon the station grounds to await the arrival of his patron. The case differs vitally from the so-called analogous ones of keepers of restaurants and venders of papers. A previous contract by a hotel keeper to serve dinner to an incoming passenger in the station waiting room would not confer upon the hotel keeper a right to set a dining table there in anticipation of the arrival of his guest. Refreshment and entertainment are mere conveniences which the carrier may, if he chooses, provide for the passenger, but it is no part of his duty to do so. In the matter of the further transportation of baggage he does owe a duty to the traveler. As there is this fundamental distinction between the cases, it is not necessary to consider the result of a decision of this case, in an attempted application of it to cases to which the reasoning cannot apply.

The right to enter upon the carrier's premises under a previous contract with a passenger being admitted, the right

## Hedding v. Gallagher

of those who seek such contract to reasonable and equal facilities cannot be denied upon any satisfactory grounds. It is argued, as in *Railroad Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89, that the defendants had no right to go upon the premises,

Carriers of Passengers—Power to Grant Exclusive Privileges to Local Carriers at Stations.

and therefore they cannot complain because others are admitted while they are shut out. It is true that no one has the right to go upon the property of a railroad corporation merely because it is railroad property. But this rule applies only so far as the corporation uses its property for private purposes, or in a public use which does not require or allow the admission of the public thereto. When this limit is passed, and the corporation puts its property to public uses, and admits thereto a part of the public, by what rule of law is it allowed to admit one and exclude another? "Public agents, taking private property for the public use, are bound to treat all alike (that is, without unreasonable preference), so far as the property is used, or its use is rightfully demanded, by the public for whose use it was taken." *McDuffee v. Railroad*, 52 N. H. 430, 454. The carriage of baggage is a right of the public. The work to be done is a part of the reasonable and necessary conduct of the public business, of which the railroad was chartered to carry on another and connecting part. It cannot be changed to a private undertaking by any form of words used in making an illegal agreement, nor by assertions (contrary to the fact) that the journey ends when the traveler and his baggage are left at the station. The duty to provide equal facilities does not end with the mere act of carriage. It extends to all things which are incident thereto and a substantial part thereof. The carriage of baggage from the station, being in the reasonable and frequently necessary furtherance of a journey partly performed upon the cars, comes within this rule. There seems to be no sound reason for a different rule as to carriers of baggage from a railway station from that which applies to carriers of passengers from an inn. *Markham v. Brown*, 8 N. H. 523. But it is

## Hedding v. Gallagher

said that this case does not apply, for the reason, in addition to those before alluded to, that a railroad may acquire its property by the exercise of the right of eminent domain, while an innkeeper has no such power. The grant of this extraordinary right cannot lessen the public obligations of the grantee. On the contrary, it has always been considered a cogent reason for holding the grantee to a strict performance of his public duty. The right can be conferred only upon those who perform such a duty. There is no substantial distinction between *Markham v. Brown* and this case. The question in each is whether the work of a public carrier is so connected with a public right that those who have undertaken another public duty intimately connected therewith must treat all such carriers alike. A common carrier, who owes the duty to furnish to passengers for Manchester reasonable and equal facilities at the station there, is bound to accord equal facilities to all who come to that station for the purpose of carrying passengers or baggage beyond its line of road. The rights of the traveling public being involved, all that the road can do is to make reasonable regulations as to how these rights shall be furthered by baggage carriers. It cannot discriminate between them.

The amendment to the bill alleges that the object of this agreement is to regulate the business, so that it may be done in an orderly manner. If this is the object, it must be sought by regulation, and not by the arbitrary admis-

Same-Same-  
Reasonable Reg-  
ulations.

sion of one, and exclusion of all others: Regulation is not discrimination, and a contract which so far discriminates that the favored party pays a substantial sum for the privileges conferred cannot be considered to be a regulation, in any fair sense of that term. If the road had the right to make an exclusive contract, it is immaterial what its object was in so doing. If, as was said in *Old Colony Railroad Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89, the defendants had no rights in the premises, and the only rights involved were those of the road, there would be no occasion to inquire into the motives of the parties or

Hedding v. Gallagher

the reasonableness of the contract. It would be entirely their private business. If it is the road's private business, it would seem to follow that an exclusive contract might be made, whereby the road exacted such a sum from the privileged carrier that he in turn must exact unreasonable prices for his services to passengers. When this course of procedure has been carried far enough, it amounts to a denial of the right of the public to have baggage carried in a reasonable way; and unless a public right is involved there is no power to prevent it.

It is argued that the right to be preserved is that of the passenger, and that these defendants take nothing by virtue of it. Even if this should be conceded to be true, it would leave the plaintiff in no better position. He sets up an agreement which he says is a legal contract, and he asks a court of equity to protect him in the enjoyment of it. But, if it appears that the agreement infringes a public right which the court is bound to preserve, it will not be recognized as a foundation upon which to base a decree. *Railway Co. v. Dohn* (Ind. Sup.), 53 N. E. 937, 45 L. R. A. 427. Same—Same  
Enforcement.

It is said that the right of railroads to make contracts regulating their respective charges has been recognized in this state (*Manchester & L. R. R. v. Concord R. R.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689), and that Same—Same. therefore this agreement is valid. But the contracts there referred to are those which directly concern the road's own business and that of its competitors. The reason for sanctioning such an agreement is that it protects stockholders from the suicidal policy of rate cutting by rival lines. No such reason exists here, and no case has been cited wherein it has been held in this state that a public carrier may create and protect a monopoly which does not directly concern his own business interests. "There would seem to be great doubt whether, upon any fair construction of general or special statutes, a common carrier, incorporated in this country, could be held to have received from the



## Hedding v. Gallagher

legislature the power of making unreasonable discriminations and creating monopolies, unless such power were conferred in very explicit terms." *McDuffee v. Railroad*, 52 N. H. 430, 454, 455.

The contention that this was merely a letting of the use of a portion of the road's real estate is also without merit. The use of the road's public rooms and platforms has been given over to public purposes. It is not the fact that ~~Same-Same.~~ the station is railroad property that gives value to the agreement here set up, but the fact that the traveling public there have need of the services of connecting carriers. And the public have the right to demand that this need shall be supplied, or, in any event, that the road shall not prevent or hinder such a result. The road cannot derive revenue from this situation by the admission of one such carrier and the exclusion of all others, under the guise that it is a mere letting of the use of its property, or the claim that neither the plaintiff nor defendants could go there as of right. The property consists of the use. The use, so far as travel and its incidents are concerned, had passed to the public, subject only to reasonable regulation. If regulations are needed, they may be made and enforced (*Markham v. Brown, supra*); but that is the extent of the right of the road to participate in the control of the business of connecting carriers, whose services it is the passengers' right to receive in a reasonable way.

The cases from other jurisdictions upholding agreements like the one under consideration are in conflict with *Markham v. Brown, supra*, and their reasoning is not satisfactory. The one most relied upon (*Railroad Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89) was decided by a bare majority of the court; and its soundness has been denied, not only by three of the seven judges who sat in the case, but also in nearly every jurisdiction where it has since been considered. *Bus Co. v. Sootsma*, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819; *Railway Co. v. Langlois*, 9 Mont. 419, 24 Pac. 209, 8 L. R. A. 753; *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15; *State*

Beecher v. Long Island R. Co

v. Reed (Miss.), 24 South. 308, 43 L. R. A. 134; Fetter, Carr. Pass. § 245; 33 Am. Law Rev. 453.

This conclusion renders it unnecessary to consider whether the statute (Pub. St. c. 160, § 1) is anything more than a declaration of the common law upon this subject. McDuffee v. Railroad, *supra*. Demurrer sustained. All concurred.

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BEECHER

v.

LONG ISLAND R. CO.\*

(Court of Appeals of New York, Jan. 9, 1900.)

Crossing Track to Board Train—Contributory Negligence—Question for Jury.†—Deceased and many other persons were in the station room when the station master announced the approach of their train, and they rushed from the room to board the train as quickly as possible, it being a very cold morning; and deceased while crossing the north track to take the train on the south track, where he had always taken it at such times, was struck by it coming in on the north track, and several of the other persons barely escaped injury from the train. There was evidence tending to show that deceased knew that it was, and had been for years, the almost universal custom not to run trains on the north track at that time of day. *Held*, that whether deceased was guilty of contributory negligence in attempting to cross the north track without looking or listening, was a question for the jury.

APPEAL, by defendant from Second department appellate division supreme court. *Affirmed*.

At Jamaica the defendant's tracks, four in number, run substantially east and west. A high fence separates the two southerly or east-bound tracks from the northerly or west-bound tracks. On the northerly side of all the tracks is a station. There was evidence tending to show that for

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\*For report of the opinion of the Appellate Division in this case, see 12 Am. & Eng. R. Cas., N. S., 295.

†See 12 Am. & Eng. R. Cas., N. S., *note*, 302 *et seq.*

*Beecher v. Long Island R. Co*

many years it had been the custom of the Long Island City trains to take the north track, which is the one next to the station, and is called the "main west-bound track"; while passengers from Brooklyn took trains on the south west-bound track, and in doing so had to pass over the platform between the station and the north-bound track, thence across the north-bound track to the platform, which had been erected between the two tracks for the accommodation of passengers, and thence across the platform to the cars. For some months prior to the 26th day of January, 1897, the plaintiff's testator had resided at Jamaica, and was a commuter on the defendant's road, using the train locally termed the "Rapid Transit for Brooklyn," which left on the south west-bound track for Brooklyn every morning at 6 o'clock. There was evidence tending to show that there had been a few occasions on which the train had left Jamaica on the north track, but it had been the custom for a number of years for it to leave on the south track, and, if there were any occasions when it did not, they constituted, as is conceded, simply exceptions to the rule. At this hour of the day there was but a very short interval of time between trains on these tracks. The train in question was due to leave the station at 6:04, the Hempstead train at 5:55, and the Rockaway train was due to start between those two periods. The Hempstead train usually went on the south track, and the Rockaway train on the north track, and was almost immediately followed by the Rapid Transit for Brooklyn on the south track; but in some way, the flagman says, the Rockaway, instead of being the second train to start, was the first, and, the Hempstead train being the second, it went on the south track, and but shortly before the Rapid Transit for Brooklyn was due. On the morning of the day in question the weather was cold, and the passengers were within the station building, when the doorman opened the door leading to the station, and called out "Rapid Transit for Brooklyn," and the passengers rushed out, the plaintiff's testator preceding them all, and when about half way across

*Beecher v. Long Island R. Co*

the north track he was struck by the locomotive of the incoming train, and instantly killed,—killed by the train that it was the intention of the passengers to board as usual on the south track, but which by some mistake of the switchman, or, if not by his mistake, then certainly without warning of the change to the passengers, was sent into the station on the north track. That there was evidence to go to the jury upon the question of the defendant's negligence has not been seriously questioned, and need not be considered, but the learned trial court was of the opinion that plaintiff's testator was chargeable with contributory negligence as matter of law, and dismissed the complaint. It is undoubtedly established that, had Beecher looked in the direction of the incoming train, he would have seen it approaching. Others, who were close behind him, saw it in time to avoid being run over, although they differed in their description of what it was that first arrested their attention; as, for instance, one of the would-be passengers and a witness saw the headlight burning on the engine, while another did not see it at all. One of the persons who was following close behind the plaintiff's testator, as he saw the engine was coming in on the north track, shouted a warning to the deceased a moment before the accident, and vainly attempted, and at considerable risk to himself, to catch hold of him.

*William J. Kelly*, for appellant.

*A. N. Weller*, for respondent.

PARKER, C. J. (after stating the facts). The plaintiff's testator having neither looked nor listened as the train approached which caused his death, the query is whether the court must say that his negligence contributed to the result, or the jury may say that it did not. The jury were at liberty to find from the evidence before it that the defendant had started the train on the south track substantially every morning for many years, and that during all that period of time, upon the announcement by the doorman of

*Beecher v. Long Island R. Co*

"the Rapid Transit for Brooklyn," the people were accustomed to rush out of the station, over the station platform to the north tracks, then across them to and upon the platform, in readiness to board the train as soon as it came to a stop; and that this custom had been so long continued that such an announcement by the doorman on the morning in question constituted an invitation to every passenger there, including the plaintiff's testator, to pass out of the station, across the station platform, then over the north tracks, and to the platform of the south track, with the assurance that the way was not only free from obstructions, but would remain so for such a reasonable time as would enable them to pass to the train in safety; and therefore it was for the jury to say whether, in accepting that invitation and proceeding as plaintiff's testator did, without looking and listening, and in the manner described by the witnesses, he was nevertheless exercising that reasonable care and caution which the situation demanded. Cases in which the principle is invoked which lies at the foundation of this decision are *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. Railroad Co.*, 84 N. Y. 241, 3 Am. & Eng. R. Cas. 380; *Palmer v. Railroad Co.*, 112 N. Y. 234, 37 Am. & Eng. R. Cas. 533, 19 N. E. 678; *Oldenburg v. Railroad Co.*, 124 N. Y. 414, 26 N. E. 1021. The order of the appellate division should be affirmed. All concur, except GRAY, J., not voting. Order affirmed, and judgment absolute ordered for the plaintiff on the stipulation, with costs.

EASTMAN

v.

MAINE CENT. R. R.

(*Supreme Court of New Hampshire, March 16, 1900.*)

**Mileage Books—Forfeiture—Validity of Condition.\***—A person who voluntarily and understandingly enters into a contract for the purchase of a railroad mileage book embracing a condition providing that it shall be forfeited if presented by any other person than the purchaser, is bound by such condition.

ALBERT H. EASTMAN against the Maine Central Railroad.  
*Judgment for defendants.*

Plaintiff purchased from defendants a mileage book on the inside of the cover of which was printed as follows: "Contract for Mileage Ticket. The conditions under which this mileage ticket is sold by the Maine Central R. R. Co., and purchased and used by the person named, are as follows: (1) That it is good only for the person in whose name it is issued, and, if presented by any other person, the right to any remaining rides to which the purchaser might have been entitled shall be forfeited, and the conductor shall be authorized to take up this ticket, and return the same to the general ticket office, as forfeited. \* \* \* I hereby agree to the above conditions. Albert H. Eastman."

*Crawford D. Henning*, for plaintiff.

*Drew, Jordan & Buckley*, for defendants.

BLODGETT, C. J. Extended consideration of this case is unnecessary. The contract between the parties was not contrary to law or public policy. The plaintiff made it

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\*See *Rahilly v. St. Paul & D. Ry. Co.* (Minn.), 5 Am. & Eng. R. Cas., N. S., 690, and *note*; *Mueller v. Chicago, etc., Ry. Co.* (Minn.), 12 Am. & Eng. R. Cas., N. S., 137.

## Pullman Palace-Car Co. v. Hunter

voluntarily and understandingly, and the responsibility for its termination rests solely with himself. There is no rule better settled, or more just in itself, than that parties who voluntarily and understandingly enter into such contracts must be governed by their terms, and are subject to the legal consequences of their violation. Having intentionally violated the express conditions of his contract, the plaintiff's mileage book justly became forfeited, in accordance with those conditions, and for the resulting pecuniary loss to him there is nobody to blame but himself. In such a case the law affords no relief. A party cannot maintain an action founded upon his own dishonesty and fraud. Judgment for the defendants. All concurred.

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## PULLMAN PALACE-CAR CO.

v.

## HUNTER.

*(Court of Appeals of Kentucky, Jan. 12, 1900.)*

**Theft of Passenger's Property—Liability of Sleeping-Car Company.\***—A sleeping-car company is liable for the loss of rings, stolen from the fingers of a passenger, caused by the failure to maintain a reasonable watch for the protection of the passenger and her property while she was asleep.

**Same—Same—Question for Jury.**—In an action against a sleeping-car company for such a loss, where it appears that the sole person charged with the duty of keeping watch in the car on the night of the theft was to some extent disqualified by reason of loss of sleep and fatigue incurred in the discharge of his duties to the company, and that on two occasions, during such night, he voluntarily absented himself from the car for at least 20 minutes, there is sufficient evidence of negligence for submission to the jury.

**APPEAL** by defendant from common pleas division Jefferson county circuit court. *Affirmed.*

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\*See Pullman Palace-Car Co. v. Harvey (Ga.), 10 Am & Eng. R. Cas., N. S., 77, and note, p. 78 *et seq.*

Pullman Palace-Car Co. v. Hunter

*Phelps & Thum*, for appellant.

*Bennett H. Young*, for appellee.

BURNAM, J. This was a suit to recover the value of three diamond rings alleged to have been stolen from appellee while she was asleep in one of defendant's cars, and which loss she alleged resulted from the failure of defend-

Case Stated.

ant's agents and employees in charge of the car to use ordinary care and watchfulness to protect her and his property from thieves, as was their duty to do under the law. The defendant denied that its agents were guilty of any carelessness, negligence, or misconduct in the discharge of their duties to the plaintiff, or that the loss of her rings was due to failure on their part to exercise ordinary care and watchfulness to prevent such loss. The trial resulted in a verdict and judgment for plaintiff for \$250, which the defendant moved the court to set aside, and grant it a new trial, upon the ground that the verdict was contrary to the law and evidence, and that the court erred in refusing to give a peremptory instruction.

It appears from the testimony that appellee, a young lady under 21 years of age, rented lower berth No. 11 of defendant's sleeping car, which left St. Louis, Mo., on the night of September 26, 1895, for Louisville, Ky., over the Baltimore, Ohio & Southwestern Railroad, paying \$2 for the use thereof, and while she was asleep three diamond rings belonging to her, and which were of the value of \$250, were stolen from her finger. The testimony of the employees of defendant shows that there were three sleeping cars attached to the train when it left St. Louis, all of which were in the charge of a single conductor, but that each car had its separate porter; that at North Vernon, Ind., the sleeping car destined for Louisville was detached from the train with which it had been connected, and attached to another locomotive, which brought it into Louisville; that at this point another conductor took charge of the car, but that it was not a part of the duty of either conductor to keep any special watch over the person



## Pullman Palace-Car Co. v. Hunter

or property of the sleeping passengers; that this matter was left entirely to the porter, a colored man, by the name of Greene, who testifies that this was his first trip over that route; that his regular run was from St. Louis to El Paso, Tex., which took three nights and two days, and required that he should be continually on duty 18 hours out of each 24; that he arrived in St. Louis from this trip on the morning of September 26, 1895; and that, owing to the inability of the regular porter to make the trip to Louisville, he was detailed by defendant's officers to make this extra trip. He says that, after making down the various berths, he stood in the aisle of the gentlemen's end of the car, blacking the boots of the male passengers, but that he made frequent visits to the smoking room, to see if anything was wanted; that when his car arrived at Vincennes and North Vernon, Ind., he locked the back door of the coach, and walked out the front door, and stood on the steps of the vestibule while the train remained at each of these places for about 20 minutes; and that during this time there was no officer or agent of the company on duty inside the coach. Conductor King, who took charge of the car at North Vernon, says that when he got on the car no agent of the company, except the porter, was on duty.

The main inducement offered to the traveling public to occupy sleeping cars, and to pay the extra fee charged therefor, is that the fatigue and discomfort of railroad travel is in some degree ameliorated by being able to sleep with security; and the company, in advertising its accommodations for sleeping, and accepting compensation therefor, becomes thereby obligated to keep a reasonable watch over the safety of its sleeping passengers and their property; and this seems to be the measure of their responsibility as defined by other courts. In the case of Plum v. Car Co. (decided by the United States circuit court in Tennessee) 13 Alb. Law J. 221, it was held

Passenger's Property—Liability of Sleeping-car Company.

## Pullman Palace-Car Co. v. Hunter

that "the company must take reasonable care of its guests and their property, especially while said guests were asleep." In *Palmeter v. Wagner*, 11 Alb. Law J. 149, the marine court of New York held that "sleeping-car companies must, by a reasonable watch, protect a passenger and the property about his person during sleep"; and in the case of *Coach Co. v. Diehl*, 84 Ind. 474, the company was held liable for the loss of a pocketbook and watch because of failure to keep a sufficient watch during the night, and to take reasonable care to prevent thefts.

It seems to us that the instructions given in this case go no further than to require at the hands of appellant a faithful performance of this duty. We are of the opinion that the motion for a peremptory instruction was properly overruled under the rule, which has been ~~Same-Same-~~  
Question for Jury. established by numerous decisions of this court, that it is improper to give a peremptory instruction for the defendant when there is any evidence which conduces to establish the right of recovery. The fact that the sole person whose duty it was, under the rules of the company, to keep a lookout in the car, had arrived in St. Louis on the morning of the day on which this train left, after a long and fatiguing passage from El Paso, Tex., certainly to some extent disqualified him from the duties of a watchman on the succeeding night; and when there is added the fact that at least on two occasions during the night he voluntarily absented himself from the car for a period of at least 20 minutes on each occasion, it furnishes some evidence conducing to show negligence on the part of the agents of the company, and authorized the submission of the case to the jury. For the reasons indicated, the judgment is affirmed.

Louisville &amp; N. R. Co. v. McEwan

LOUISVILLE &amp; N. R. Co.

v.

McEWAN.

*(Court of Appeals of Kentucky, June 13, 1899.)*

**Excessive Verdict.**—In an action by a female white passenger against a railroad company for injuries received at the hands of a negro passenger by a pistol shot, it appeared that the injuries caused great pain and suffering, disfigurement of the face, and permanent partial paralysis. *Held*, that a verdict of \$12,000, was not excessive.

**Duty to Protect Passenger from Other Passengers.\***—A railroad company is liable to its passengers for injury done by another passenger, where the conduct of the latter had been such before the injury as to induce a reasonably prudent and vigilant conductor to believe that there was reasonable ground to apprehend violence and danger to the other passengers; and its conductor failed to use all reasonable means to prevent such injury; and there was sufficient evidence to warrant the jury in concluding that plaintiff's injury resulted from defendant's conductor's negligence in this respect.

**Remarks of Counsel.**—In such an action, a verdict for plaintiff will not be reversed because of improper remarks of her counsel in his argument to the jury, where defendant did not object thereto, nor request any ruling on the subject.

**APPEAL**, by defendant from Franklin county circuit court.  
*Affirmed.*

*J. W. Rodman and Wm. Lindsay, for appellant.*

*J. A. Scott, W. H. Holt, John Young Brown, and Knott & Edelen, for appellee.*

HOBSON, J. This is the second appeal of this case. For the opinion on the former appeal, see *Railroad Co. v. McEwan* (Ky.), 31 S. W. 465, 2 Am. & Eng. R. Cas., N. S., 438. The facts of the case are fully stated in that opinion, and need not be repeated here. A new trial was had as therein directed, resulting in a verdict for the plaintiff for \$12,000. The evidence does not appear to be essentially different from what it was on

**Excessive  
Verdict.**

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\*See notes, 2 Am. & Eng. R. Cas., N. S., 444 *et seq.*

## Louisville &amp; N. R. Co. v. McEwan

that appeal, and it was then held sufficient to warrant the submission of the case to the jury. The proof is conflicting, but, as the jury found a verdict for the plaintiff after being out only 20 minutes, it is evident that they believed the witnesses for appellee. Conceding this testimony to be true, we cannot say that the verdict is unwarranted, and, while it is large, it is not so large as to justify us in setting it aside as excessive, where there has already been a previous verdict in the case, and there is evidence tending to show that appellee has received an injury causing great pain and suffering, and that the spinal column has been affected, producing results which have overshadowed, if not blighted, her life. The instructions of the court to the jury fairly presented the law of the case. We do not think the jury could have misunderstood them. There were five drunken and disorderly negroes on the train. It was impossible for people who did not know them to remember with distinctness what each one of them separately did; but the proof is very clear that they acted together; that they were drunk, obscene, and disorderly; that, though the conductor was appealed to several times, he did not take any active step to prevent the consequences which followed, and which a man of ordinary sense must have apprehended was likely to result from the way the negroes were carrying on in the train. This was an excursion train, at night, and when the defendant had notice that these five negroes were drunk, and that the passengers deemed themselves in danger at their hands, it should have taken some adequate steps to have prevented the results that followed and that were the natural consequences of the state of facts known to it and called to its attention by the passengers. The cardinal fault of the appellant was that it crowded the people in the front cars, so that many could not get seats, while the rear part of the train was not filled. The five negroes who created the disorder were standing up in the aisle with a number of white men, unable to get seats, from the time the cars were opened until the accident happened, something like an hour afterwards.

## Louisville &amp; N. R. Co. v. McEwan

When the conductor was so often urged to put these drunken, disorderly, and obscene negroes off the train, and it was apparent to any one that the cause of disturbance must continue while they had no seats, and were doing as drunken negroes might be expected to do, the conductor should, at least, have sent them to the rear cars, where there were empty seats, and made them stay there. Instead, they were left to roam the cars at will, impressed with the conviction that they were martyrs on account of their color, and that it was a condescension on their part to take liberties with any one on the train. When the row began in the car where appellee was, and a race collision was imminent, the conductor put the five negroes out of that car into the next, and left them there, to go through the same performance in that car; and when the fight there was on, and the battle was waged from that car to the next, he simply again put the negroes out of the car, leaving them on the platform, to renew the conflict as soon as opportunity offered. Under such circumstances, it seems to us the jury were warranted in concluding that the subsequent shooting, in which appellee was struck, was a result reasonably to be apprehended from the surrounding circumstances, and that might have been avoided by ordinary care on the part of appellant.

Duty to Protect  
Passenger from  
Other Passen-  
gers.

The statements of the counsel for appellee in his concluding argument were unjustifiable, and should not have been made; but it does not appear that the court's attention was called to it, or that he was asked to make any ruling on the matter. We see no other irregularity in the trial, and are unwilling to reverse for this, when we are satisfied from the record that the jury believed appellee's version of the matter; that their verdict was governed by the view they took of the case, rather than by the statement of the counsel; and that another jury would do the same thing. The litigation has now been prolonged many years, and we think it is to the interest of both parties that it should cease. Judgment affirmed.

Remarks of  
Counsel.

Lessard v. Boston & M. R. R

LESSARD

v.

BOSTON & M. R. R.

(*Supreme Court of New Hampshire, July 28, 1899.*)

**Baggage—Liability for Loss on Connecting Line.\***—Under the law of New Hampshire, in the absence of evidence to the contrary, the presumption is that a railroad does not contract to carry a passenger's baggage beyond its own line, although it issues him a ticket entitling him to ride over its own lines and connecting lines.

EXCEPTIONS by plaintiff from Hillsboro county. *Over-ruled.*

*Henry B. Atherton*, for plaintiff.

*Oliver E. Branch* and *Charles H. Burns*, for defendants.

PRASLEE, J. The question of whether the defendants contracted to carry the plaintiff and his baggage beyond their own line of road was one of fact, and the verdict will not be disturbed if there was evidence to warrant the conclusion reached. *Gray v. Jackson*, 51 N. H. 9. Whether the printed matter on the ticket was express notice to the purchaser, who was unable to read it, is a question not necessary to be considered. It was incumbent upon the plaintiff to prove that the defendants made a contract to carry his baggage beyond their own line of road. It was not necessary for the defendants to negative a presumption that they made such a contract; for, under the law of this state, no such presumption arose. *Gray v. Jackson, supra*. The case differs from those where the carrier attempts to limit the liability which ordinarily attaches to the contract for carriage. In such cases, the party who seeks to vary the agreement ordinarily implied as a part of the contract to carry must show that the other party

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\*See monograph by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., 1.

## St. Louis &amp; S. F. R. Co. v. Kilpatrick

had notice of the intent to make such special arrangement. But here it was necessary for the plaintiff to prove as a fact that the defendants did make the special contract which he sets up. The verdict was based upon the finding that the defendants gave express notice that they did not contract as the plaintiff claimed, and seems to have resulted from the theory that the defendants must show, not only that they did not make the contract, but also that they expressly refused so to do. While this theory is erroneous, yet, as the prevailing party was held to be under a greater obligation than the law imposed, the verdict must stand. *Felch v. Railroad Co.*, 66 N. H. 318, 29 Atl. 557. The finding that they gave express notice that they would not contract in a certain way necessarily includes one that it was not proved that they did so contract. Exception overruled. All concur.

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St. Louis & S. F. R. Co.

v.

## KILPATRICK.

*(Supreme Court of Arkansas, Oct. 28, 1899.)*

**Passengers—Failure to Purchase Ticket—Statute.\***—Under the statute of Arkansas providing, in substance, that the purchase of a ticket is not a prerequisite to the relationship of passenger and carrier, one who in good faith goes to a railroad station, intending to take passage upon one of the carrier's regular passenger trains, who is able and intends to pay his fare upon the demand of the carrier, and who enters over the steps of a passageway to a passenger car, and through an unobstructed entrance, which passengers may freely use, is a passenger, although he has not purchased a ticket, and did not enter at a place where an employee was stationed to inspect tickets, and has passed over to, and is found by such employee standing temporarily upon, the platform of a coach in which passengers were not permitted to ride.

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\*See generally *Inness v. Boston, R. B. & L. R. Co.* (Mass.), 9 Am. & Eng. R. Cas., N. S., 819, and *foot-note*.

St. Louis & S. F. R. Co. v. Kilpatrick

**Ejection of Trespassers.\***—A railroad must not eject a trespasser from a car in such a manner as to willfully, wantonly, or maliciously injure him.

**Malicious Ejection of Passenger—Malice—Necessity of Proving Employee's Authority.†**—A passenger maliciously ejected from a railroad car need not prove, in order to recover against the company, that its employee by whom he was ejected was acting within the scope of his employment.

**Proximate Cause.**—Where a passenger is violently pushed down the steps of a train running "pretty fast," and he, in attempting to break the force of his fall by catching hold of the car, brings his foot under the wheels, such pushing is the proximate cause of the injury to his foot.

**Witnesses—Attachment.**—Where a party is not entitled to enforce the attendance of a witness, it is not error to refuse him an attachment for such witness.

**Continuance.**—Where it is not error to refuse a continuance, it cannot be error prejudicial to the requesting party to grant the continuance, *ex gratia*, but upon condition of the payment by him of the expense of the jury during the continuance.

**Instructions—Arguments—Discretion of Court.**—The time for preparing and presenting requests for instructions, and for determining the law of the case after the evidence is closed, and for making arguments to the jury, are all within the sound discretion of the trial court.

**Evidence—Parole Testimony to Prove Contents of Placard.**—In an action for the ejection of a passenger, by defendant's brakeman, it was not error to allow the introduction of testimony as to the contents of a placard attached to the car platform, to prove whether the ejection of passengers was within the scope of the brakeman's employment, as the scope of his duties could be shown by parole evidence.

**New Trial—Surprise.**—A motion for a new trial should never be granted on the ground of surprise when it is shown that the party claiming to have been surprised could have overcome the conditions which caused the alleged surprise.

**Same—Same.**—The fact that a party has made statements out of court conflicting with his sworn testimony cannot be a plausible ground for surprise, in such an action.

**Appeal—Review.**—Where it is contended on appeal that the verdict

\*See *Louisville & N. R. Co. v. Bernard* (Ky.), 6 Am. & Eng. R. Cas., N. S., 55, and notes, 59 *et seq.*

†See *Haver v. Central R. Co.* (N. J.), 12 Am. & Eng. R. Cas., N. S., 261 and extensive note, 266 *et seq.*



St. Louis &amp; S. F. R. Co. v. Kilpatrick

was contrary to the evidence, the question for review is, not what the verdict should have been, in the opinion of the supreme court, but whether there was any evidence before the jury sufficient in law to warrant the verdict as it is.

APPEAL by defendant from Franklin county circuit court.  
*Affirmed.*

*L. F. Parker and B. R. Davidson, for appellant.*

*Chew & Fitzhugh and C. B. Moore, for appellee.*

WOOD, J. The complaint alleged, in substance, that George Kilpatrick boarded appellant's train at Van Buren, intending to go to Chester as a passenger, but that appellant negligently, willfully, and maliciously ejected him, whereby his foot was caught under the cars, and so badly crushed as to necessitate amputation. The answer denied all material allegations, and set up contributory negligence. The substantive facts, as testified to by appellee, are: That he went to appellant's station at Van Buren for the purpose of taking its passenger train to Chester. The fare from Van Buren to Chester was 75 cents, and appellee had the money to pay his fare. Appellee got upon the depot platform, even with the front end of the smoking car, and got on the front end of the smoking car. He did not enter the coach, for the reason that he desired to see two companions who had gone up the track a short distance, to wave at him as he passed by. He went and was standing upon the rear end of the second car from the engine. He went to the depot, and just as he stepped upon the platform the train was ringing the bell and getting ready to pull out. He noticed a man standing down at the rear end of the smoking car,—the third car from the engine,—who had a lantern in his hand, and who was helping passengers on and off. Appellee did not go to the end of the car where the brakeman was, because he did not have time. He did not get on until after the cars had started. The brakeman did not get on until after appellee had gotten on. The man appellee had seen standing at the rear end of the car came on

St. Louis & S. F. R. Co. v. Kilpatrick

through the car to where appellee was standing on the platform, and appellee saw the word "Brakeman" on his cap. He asked appellee where he got on, and appellee told him, "At Van Buren." He then asked appellee where he was going, and appellee replied, "To Chester." He then asked appellee if he had a ticket, and appellee told him he did not have time to get a ticket. That the brakeman then told appellee to get off, and appellee replied that "the train was running too fast; besides, he had the money to pay his fare to Chester; and the brakeman said it did not make a damn bit of difference; that he [appellee] would have to get off,"—and the brakeman put his hands on appellee's shoulders, and gave him a pretty hard shove down the steps, and as appellee was falling he grabbed the iron at the end of the car, and it threw him to one side, and the train ran over his foot, crushing it all to pieces, so that it had to be amputated. Appellee was thrown off at the road crossing about 250 yards from the depot platform. The testimony of appellee as to his having money to pay his fare, and as to the time, place, and circumstances of his getting on the cars, is corroborated by several witnesses. There was much evidence on behalf of appellant contradictory of all this. It was shown that the train which injured appellee consisted of two sleepers, a chair car, a coach, a combination car, and baggage car. A part of the train was vestibuled. The vestibule requires the door to be opened to enter; that is, passengers passed through a door on the steps of the car before getting on the platform. The sleepers, the chair car, and between the chair car and smoking car are vestibuled. Between the combination car and the smoking car it is vestibuled on the coach end. The platform of the combination car was open. It was the duty of the brakeman to station himself at the steps of the car, and prevent people from entering the cars who did not have tickets. A placard fastened to the handles of the platform on the rear end of the coach read: "Trainmen must examine tickets before allowing passengers to enter the cars." This was one of the rules of the company. A man on the

## St. Louis &amp; S. F. R. Co. v. Kilpatrick

platform would not be considered within the cars. It was further shown that, if a passenger applied to enter the train without a ticket, same would be held, to enable him to purchase one. The verdict was for \$12,000. A remittitur was entered for \$7,000, and judgment was rendered for \$5,000. Appellant insists upon a reversal of this judgment for the following reasons, which we will consider in the order presented by its counsel :

1. Because the plaintiff was not a passenger. The court, *inter alia*, instructed the jury as follows: "Unless it appears from the preponderance of the evidence that plaintiff at the passenger station got upon defendant's passenger train, able and intending to pay for being carried as a passenger thereon, and that a brakeman on said train, acting within the scope of his authority, willfully, maliciously, and wantonly, knowing the danger to plaintiff of such act, pushed plaintiff from said train while it was in such rapid motion as to endanger plaintiff's safety, and thereby caused plaintiff the injuries mentioned in the complaint, he cannot recover." "If the plaintiff was stealing a ride on defendant's train, and was pushed off in any manner by a brakeman on defendant's train, plaintiff cannot recover, and you must find for the defendant." Under these instructions, the jury must have found that appellee was a passenger, and that he was "willfully, maliciously, and wantonly expelled." Appellant contends that appellee was not a passenger, "even if the facts be taken as stated by him, because they show that he had not purchased a ticket, that he did not go upon the car at the proper place, and that he remained on the platform of a coach in which he would not have been permitted to ride, and made no effort to enter the train until after it had run six hundred feet." We are of the opinion, conceding the facts to be as appellee states them, and as the jury might have found, that appellee was a passenger. In other words, one who in good faith goes to a railroad station, intending to take passage upon one of its regular passenger trains, who is able and intends to pay his fare upon the

Passengers—Failure to Purchase Ticket—Statute.

## St. Louis &amp; S. F. R. Co. v. Kilpatrick

demand of the carrier, and who enters over the steps of a passageway to a car where passengers ride, and through an entrance unobstructed, which passengers may freely use,—we say, one who embarks upon a passenger train under such circumstances is a passenger, although he may not have purchased a ticket, and may not have entered at a place where a porter or brakeman was stationed to inspect tickets, and although he may have passed over to, and may have been found standing temporarily upon, the platform of a coach in which passengers were not permitted to ride. The purchase of a ticket is not a prerequisite to the relationship of passenger and carrier under our statute. Section 6213, Sand. & H. Dig. A rule requiring those who intend to become passengers to purchase tickets before entering the cars, and to exhibit same to an agent of the company stationed at the steps or entrance of the cars, being for the convenience of the company and the traveling public as well is generally considered reasonable, and may be enforced by any proper methods. In some jurisdictions the manner of enforcement may be carried to the extent of expulsion on failure to comply with the rule. And, where there is no inhibitory statute, a common method of enforcement is by requiring the one who does not purchase a ticket to pay more fare than one who does. But, before such a rule can be enforced in those jurisdictions, a reasonable opportunity must have been afforded the passenger to comply with the rule, and there must have been notice given of such rule. See Hutch. Carr. § 570; 3 Wood, R. R. p. 1674, § 361; 4 Elliott, R. R. § 1603, and authorities cited by these writers; 1 Fetter, Carr. Pass. pp. 689, 690, §§ 267, 268. But our statute provides that “all passengers who may fail to procure regular fare tickets shall be transported over all railroads in this state at the same rate, and price charged for such tickets for the same service.” Section 6213, *supra*. Any rule which prescribed, as a method of enforcement for noncompliance therewith, the forfeiture of the right to be carried as a passenger, would contravene this statute, which, in our opinion, does not contemplate the expulsion of passengers for

## St. Louis &amp; S. F. R. Co. v. Kilpatrick

failure to purchase tickets and to exhibit same before entering the cars. It seems to make no difference, under this statute, whether the failure of the passenger to procure a ticket is caused by the infidelity or carelessness of the railway's employees, or by the carelessness of the passenger. As to appellee's standing upon the platform of a coach where passengers were not permitted to ride, the proof by appellee would warrant the inference that this was but a temporary position, taken for the purpose of seeing two of his companions who had gone up the track a short distance, to wave at him as he passed by. The jury might have inferred that the brakeman did not eject appellee because he was standing upon the platform, but because he had no ticket. Taking the appellee's testimony as true, it does not appear that he had furtively taken his position on the platform for the purpose of stealing a ride, and thus defrauding the company of its fare for transportation. Believing him, as the jury did, there is nothing in his position upon the platform to constitute him a trespasser. One who goes upon the platform of a car of a passenger train with the *bona fide* intention of paying his fare and becoming a passenger does not forfeit his right to be protected as such because, forsooth, he tarried, for a short time before entering the car, in a place where passengers are forbidden to ride. Such a one, we think, comes completely under the control of the company when he steps upon the train, intending to become a passenger. His acceptance by the carrier from that moment should be implied, and his divergence temporarily from the right way as a passenger should not lessen the duty of care due him by the carrier, but only lessen his chances for recovery, by reason of his own negligence. A passenger who voluntarily assumes a dangerous and forbidden position on a train does not thereby forfeit his rights to the care due by the railway company to its passengers. But if an injury occurs to him while in the position, which would not have been produced had he not been in such position, although the injury was also the result of the negligence of the company,

## St. Louis &amp; S. F. R. Co. v. Kilpatrick

he cannot recover, because of his contributory negligence. Hutch. Carr. §§ 651, 652, and authorities cited; 1 Fetter, Carr. Pass. p. 428, § 167; 4 Elliott, R. R. §§ 1630, 1633; 2 Wood, R. R. p. 1327, § 308. But, whether appellee was passenger or trespasser, the company, under the finding by the jury that he was willfully, <sup>Ejection of Trespassers.</sup> maliciously, and wantonly expelled, would still be liable, if it were bound by the conduct of the brakeman; for, although the carrier owes the trespasser no positive duty of care, it must not injure him willfully, wantonly, and maliciously. Railroad Co. v. Dial, 58 Ark. 318, 24 S. W. 500, and authorities cited; Railway Co. v. Hackett, 58 Ark. 381, 24 S. W. 881; Davis v. Houghtelin (Neb.), 14 L. R. A. 737, note (s. c. 50 N. W. 765); 2 Wood, R. R. p. 1045, § 259; 2 Fetter, Carr. Pass. § 240, p. 622, and authorities cited; 4 Elliott, R. R. § 1253. The instructions *supra* were therefore more favorable to appellant than it had the right to ask. This brings us to consider appellant's second reason for reversal.

2. Because appellee did not prove that he was ejected by an employee acting within the scope of his employment. Appellee being a passenger, this was immaterial. Hutch. Carr., § 595 *et seq.*; 4 Elliott, R. R. § 1638; Haver v. Railway Co. (N. J. Err. & App.) 12 <sup>Malicious Ejection of Passenger—Malice—Necessity of Proving Employee's Authority.</sup> Am. & Eng. Ry. Cas. (N. S.) 261, and note (s. c. 41 Atl. 916). But there was evidence to justify the conclusion that the brakeman was acting within the scope of his employment. It was his duty to see that persons did not enter the cars without tickets. There was evidence from which the jury might have found that he was attempting to perform this duty, and pushed it to the rigorous and unwarranted extreme of removing all possibility of the passenger's entering ticketless, by violently removing him from the train. For a similar act it has been held that the company as well as the brakeman is liable. Priest v. Railroad Co., 40 How. Prac. 456. See 3 Elliott, R. R. § 1253,

St. Louis & S. F. R. Co. v. Kilpatrick

and authorities cited in notes; Railroad Co. v. Washington (Tex. Civ. App.) 30 S. W. 719.

3. Because pushing the boy from the platform was not the proximate cause of the injury. Pushing a boy "with a pretty hard shove" down the steps from the platform of a car on a train running "pretty fast" might reasonably be expected to produce most serious consequences. Just such an effect as was produced here might naturally be expected to follow as the proximate result of such a forcible expulsion. It was but natural that one should attempt to break the force of his fall by catching to any support at hand, and in doing so to bring his feet, which were necessarily dangling and uncontrolled, under the wheels of the moving train.

4. Because it was an abuse of discretion to refuse an attachment for the witness Dr. Giles Lucas, and also to refuse to adjourn the hearing from 7 o'clock p. m. until 9 a. m. of the following morning for the testimony of Dr. Lucas and J. R. Cocke; and it was contrary to law, as well as an abuse of discretion, to impose upon the defendant the payment of \$24 to the county of Franklin, expenses of the regular panel of the jury for one day, as a condition upon which the case could stand open, and compel the defendant to proceed to prepare, argue, and settle instructions in the night, and argue a case of this magnitude in the night, and deprive it of this valuable testimony expected on the morning

train. Under our statute the deposition of a practicing physician may be used, instead of his testimony *ore tenus*. Subdivision 2, § 2978, Sand. & H. Dig. And such witness shall not be compelled to attend unless he has failed, when duly summoned, to appear and give his deposition. There was no showing that Dr. Lucas had been summoned, and had failed to appear and give his deposition. Section 2979. Appellant could not, therefore, enforce his attendance, and the court did not err in refusing an attachment for him. Moreover, it appears that the testimony he was expected to give was but cumu-

Proximate  
Cause.

Witnesses—  
Attachment.

## St. Louis &amp; S. F. R. Co. v. Kilpatrick

lative, and no prejudice could have resulted from his failure to testify. *Railway Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, and 31 S. W. 147; *Brown v. Railway Co.*, 52 Ark. 120, 12 S. W. 203. Appellant had not asked for a continuance of the cause on account of the testimony of the witness Cocke, but consented to go into the trial without him, with the understanding that, if he did not appear in person before the conclusion of the evidence, a certain statement which was reduced to writing and agreed upon should be read as evidence. Cocke did not appear, and this statement was read. It was certainly not error for the court to refuse to postpone the cause for any length of time, under these circumstances, in order to obtain these witnesses. If it was not prejudicial error for the court to have refused it absolutely, it certainly could

Continuance.

not be erroneous for the court to have granted the request for a postponement, *ex gratia*, but upon condition that appellant pay the expense of the regular panel of the jury for one day. As appellant did not see proper to comply with the condition, the result was tantamount to a refusal by the court to grant the request for postponement. It would have been quite different had appellant been entitled as a matter of right to the postponement. Then, had the court imposed, as a condition for the granting of such request, terms that were unreasonable and illegal, the appellant would be in an attitude to complain. It appears that witness Cocke lived in Iowa, and was absent from the state. Under section 2978, Sand. & H. Dig., his deposition might have been taken. Appellant was not in a position to enforce the attendance of these witnesses in person, nor to insist upon a continuance or postponement of the cause on account of their absence. The court could not know that the absent witnesses, whose coming was of their own volition, would certainly make their appearance at the time expected. Many contingencies might have prevented. The witnesses were not within the court's power. The court, we think, under the circumstances, might very properly have granted the



St. Louis & S. F. R. Co. *v.* Kilpatrick

postponement without imposing the condition, inasmuch as it does not appear that such a postponement would have been detrimental to the rights of appellee. But its refusal to do so was not error. The time for preparing and presenting requests for instructions, and for determining the law of the case after the evidence is closed, and for making arguments to the jury, are all within the sound discretion of the trial court; and it is a large discretion, which will not be restricted further than to prevent injustice or oppression. No abuse of such discretion is shown here.

Instructions—  
Arguments—  
Discretion of  
Court.

5. Because the court erred in allowing the plaintiff to introduce the testimony of W. R. Titus as to what the placard contained. The evidence was not introduced for the purpose of showing the contents of the placard. That was not the matter in issue. The purpose of the evidence was to determine what was the duty of the brakeman. The placard was one method of showing it, but it was not the only one. It could be, and was, established by other proof; and that, too, without objection from appellant. Appellant itself proved by two witnesses precisely the same thing that the appellee showed the placard contained, and it asked instructions bearing upon the proof thus offered by it. We think appellant, therefore, must be held to have waived any objection it might have had to the manner of proving the contents of the placard, even if such objection were otherwise well taken. *Thomp. Trials*, 706, 707. But the contents of the placard were merely incidental to the main issue, and we might say of this placard as we said of a certain statement in *Triplett v. Distilling Co.*, 66 Ark. —, 49 S. W. 976: "It does not come within any of the classes mentioned by Prof. Greenleaf as excluding oral evidence where there is a writing in existence evidencing the same facts." 1 *Greenl. Ev.* § 85 *et seq.*; *Id.* § 97. See, also, *Railroad Co. v. George*, 19 Ill. 510; *Yonge v. Kinney*, 28 Ga. 111; and other authorities cited in appellee's brief.

Evidence—Parole  
Testimony to  
Prove Contents of  
Placard.

St. Louis & S. F. R. Co. v. Kilpatrick

6. Because of error in the granting and refusing of requests for instructions (embracing reasons for reversal from 6 to 13, inclusive). The charge of the court contains no error of which the appellant may complain, and really presents the law more favorably to appellant than it had the right to ask or expect. We refrain from discussing the objections *seriatim*, because what we might say would be but a repetition of familiar principles oftentimes announced by this court.

7. Because the motion for new trial on account of surprise and misconduct should have been granted. In its motion for new trial, appellant states that it "was surprised by the testimony of Geo. Kilpatrick to the effect that he had entered the train from the right side of the train (that is, from the platform of the station), when he had repeatedly told credible parties that he had entered the train from the left side, opposite to the platform, which facts had been communicated to defendant, and defendant had no notice that anything would be claim to the contrary, and relied upon the testimony being in accord with his statement. And also by his testimony to the effect that he was on the rear end of the car next the smoker, which was two car lengths from the locomotive, when he had repeatedly stated to divers parties that he was on the front end of the first coach or car, which was the end of the car next to the locomotive, which facts had been communicated to defendant; and it relied upon plaintiff's testifying to this state of facts, and was prepared to show by many witnesses that there was a solid partition in the second car from the engine, through which no one could pass, from the position where the brakeman was conceded to be, to the place where Kilpatrick had represented himself to be. That defendant's surprise was such that ordinary prudence could not have guarded against it." The alleged misconduct of plaintiff, for which a new trial was asked, consisted in the making of the statements set out *supra*, and the further statement to divers parties, who communicated same to defendant, "that he did not know

St. Louis &amp; S. F. R. Co. v. Kilpatrick

who pushed him off,—did not see the party that pushed him off,”—whereas upon the trial he testified to a different state of facts; and further misconduct in refusing to make any statement of the facts set out *supra* to defendant, and in exercising control over his witnesses to such an extent that he would not allow them to make any statement of facts within their knowledge to defendant. The appellant made no effort at the trial, after the testimony of Kilpatrick was adduced, to have the cause postponed or continued for the purpose of getting the witnesses by whom it expected to show that the plaintiff had made statements, upon which it relied, contradictory to his testimony on the trial. It did not show that the witnesses to whom he made these contradictory statements complained of were not then present at the trial, nor that it could not prove the alleged facts and statements in contradiction of the testimony of appellee as well by the witnesses who were present as by those who were absent. If appellant had any right to be surprised, and was really surprised, at the testimony of appellee, it certainly did not manifest its surprise at the proper time. As these statements which appellee is said to have made before the trial were communicated to appellant, it knew who the witnesses were at the time of the trial, when appellee was giving the alleged inconsistent evidence, yet appellant did not then express its desire to have these witnesses, and to show these alleged inconsistencies. In *Nickens v. State*, 55 Ark. 567, 18 S. W. 1045, it is held that “one who is surprised by his adversary’s testimony is not entitled to a new trial on that ground, if, instead of asking a postponement to procure necessary evidence, he reserves his surprise as a masked battery in the effort for a new trial.” *Overton v. State*, 57 Ark. 60, 20 S. W. 590, and authorities there cited, including many civil cases. There is no reason for a different rule in civil cases. Appellant has not brought itself within this rule. Asking for a temporary postponement on account of the absence of witnesses Lucas

## St. Louis &amp; S. F. R. Co. v. Kilpatrick

and Cocke was not put upon the ground of surprise. But, aside from this, a motion for new trial should never be granted on the ground of surprise New Trial—  
Surprise. when it is shown that the party who claims to have been surprised had the means at hand to challenge and overcome the conditions which caused the alleged surprise. Such was the case here. If appellant was surprised that appellee testified that he entered the car from the right side, when he had previously told divers persons that he entered from the left, then appellant was prepared to show, and did show, that appellee had stated that he entered from the left; and additional testimony upon that point would only be cumulative, and for contradiction. So, also, if it (appellant) was surprised that appellee testified that he was on the rear end of the car next to the smoker, when he had previously stated to divers persons that he was on the front end of the first coach, it was prepared to show, and did show, by witnesses, that he had made such statements. In fact, it appears from an examination of the affidavits in support of the motion for new trial that, when compared with the facts proved at the trial, they are but reiterations, in all substantive and pertinent points, of what was actually shown at the trial. The alleged misconduct of appellee in making statements to persons, out of court, different from his testimony on the trial, by which appellant was deceived and disappointed, and in not permitting his witnesses to talk with appellant's agents with reference to the facts of the case, presents a cause for reversal more novel than substantial. However reprehensible in morals such duplicity and disingenuous conduct might be, we know of no rule of law that makes such conduct a bar to recovery, or even a plausible ground for surprise, in actions of this kind. Undoubtedly such conduct should go very far towards convincing the jury that the one guilty of such conduct was unworthy of belief, and thereby lessening the chances of his success in a case depending upon his evidence. But that is as far as it could

St. Louis &amp; S. F. R. Co. v. Kilpatrick

go. Appellant and appellee were dealing at arm's length. Appellee was under no obligation to disclose his case to appellant. Nor can his making statements to various parties, out of court, in conflict with his sworn testimony, which statements were communicated to appellant, be considered such misconduct as would forfeit his right to recover. Such alleged misconduct did not deprive the appellant of its right to show the truth on the trial. We do not see that there is anything whatever in the alleged misconduct germane to the issue of the liability or nonliability of appellant, further than as we have indicated as affecting the credibility of appellee as a witness, and that was for the jury.

8. Because the verdict was contrary to the evidence. We have grave doubts of the correctness of the verdict. It seems to us that appellee, in view of the statements he is shown to have made to various persons, so utterly contradictory of his testimony on the witness stand, was rendered wholly unworthy of belief. In coming to this conclusion, the numerous affidavits of appellant produced on its motion for new trial have made their impression upon us. But, of course, we must eliminate any such impression, in favor of the jury's verdict, for the affidavits were not before it. But, aside from these, it seems to us the preponderance of the evidence was in favor of appellant's contention, and the learned trial judge might very properly have set aside the verdict. But he saw and heard the witnesses, and doubtless knew sometimes of their character and standing which it is impossible for us to know. After the trial judge has permitted such a verdict to stand, such deference is given to his opinion that it has become a time-honored rule of law not to disturb his finding when there is any legally sufficient evidence to justify the verdict. The question here is, not what we think the verdict should have been, but, was there any evidence before the jury sufficient in law to warrant the verdict as it is? When brought down to this point, it is impossible for us to say that there

Appeal—Review.

Cleveland, C., C. & St. L. Ry. Co, *v.* People *ex rel.* Jett

was no evidence to support the verdict. Other questions were presented in the motion for new trial, and not abandoned in the presentation or oral argument; and we have examined them, but find nothing in them to constitute reversible error. The judgment is affirmed.

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CLEVELAND, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY  
Co.

*v.*

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JETT.

(*Supreme Court of the United States, March 16, 1900.*)

**Statute Requiring Passenger Trains to Stop at County Seats—Burden upon Interstate Commerce.\***—A state statute is invalid, as a direct burden upon interstate commerce, which requires every passenger train, regardless of the fact that some of them are engaged in interstate commerce and of the question whether all the local and interstate traffic within the state is not sufficiently accommodated by trains specially designated for such business, to stop at every county seat within the state through which such trains may pass by day or night.

**ERROR by defendant to the state of Illinois supreme court.  
*Reversed.***

**Statement by MR. JUSTICE BROWN :**

This was a petition for a writ of *mandamus* filed in the circuit court for the county of Montgomery, by the state's attorney for that county, to compel the defendant railway company, which for several years past has operated, and is now operating, a railroad from St. Louis, Missouri, through the county of Montgomery and the city of Hillsboro, the county seat of such county, to Indianapolis, Indiana, to stop a regular passenger train designated as the "Knickerbocker

\*See Cleveland, C. C. & St. L. Ry. Co. *v.* People *ex rel.* Jett (Ill.), 14 Am. & Eng. R. Cas., N. S., 846 and notes, p. 851.

Cleveland, C., C. & St. L. Ry. Co. v. People *ex rel.* Jett

Special," at the city of Hillsboro, a sufficient length of time to receive and let off passengers with safety.

The petition was based upon section 26 of an act of the General Assembly of Illinois, entitled "An Act in Relation to Fences and Operating Railroads," approved March 21, 1874, which reads as follows :

"Every railroad corporation shall cause its passenger trains to stop upon its (their) arrival at each station advertised by such corporation as a place of receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: *Provided*, all regular passenger trains shall stop a sufficient length of time at the railroad stations of county seats to receive and let off passengers with safety."

The answer of the railroad company averred that the company furnished four regular passenger trains each way a day, passing through and stopping at Hillsboro, and that they amply accommodated the travel, and afforded every reasonable facility to such city; that the Knickerbocker Special was a train especially devoted to carrying interstate transportation between the city of St. Louis and the city of New York; that the travel between these cities had grown to such an extent that it had become necessary to put on a through fast train, which connected with other similar trains on the Lake Shore and New York Central roads, and that it was necessary to put on this train because the trains theretofore run, none of which had ever been taken off, could not, by reason of stopping at Hillsboro and other similar stations, make the time necessary for eastern connections, or carry passengers from St. Louis to New York within the time which the demands of business and interstate traffic required; that the Knickerbocker Special is not a regular passenger train for carrying passengers from one point to another in the state of Illinois, such traffic being amply provided for by other trains, and that the Knickerbocker Special is used exclusively for interstate traffic from and to points without the state of Illinois; that it is not subject to regulation by the

Cleveland, C., C. & St. L. Ry. Co. v. People *ex rel.* Jett

statutes of Illinois providing that all trains shall stop at all county seats, and that to subject it to the statutes of the various states through which it passes, requiring it to stop at county seats, would wholly destroy the usefulness of the train, and would impede and obstruct interstate commerce, and that obedience to the statute in question would require it to abandon the train.

A demurrer to this answer was sustained, and the defendant electing to stand upon it as a full defense to the petition, a final judgment was rendered and a peremptory writ of *mandamus* awarded against the defendant. On appeal to the supreme court of the state this judgment was affirmed. Whereupon the railway company sued out a writ of error from this court.

*Messrs. John T. Dye and George F. McNulty*, for plaintiff in error.

*Messrs. E. C. Akin, C. A. Hill, and B. D. Monroe*, for defendant in error.

MR. JUSTICE BROWN delivered the opinion of the court :

Few classes of cases have become more common of recent years than those wherein the police power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.

We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by the state authorities (*Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. Rep. 564), requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*Nashville, C. & St. L. R. Co. v.*



Cleveland, C., C. & St. L. Ry. Co. *v.* People *ex rel.* Jett

Alabama, 128 U. S. 96, 32 L. Ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28), requiring telegraph companies to receive despatches and to transmit and deliver them with due diligence, as applied to messages from outside the state (*Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. Rep. 934), forbidding the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 41 L. Ed. 166, 16 Sup. Ct. Rep. 1086), requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710), forbidding the consolidation of parallel or competing lines of railway (*Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849, 16 Sup. Ct. Rep. 714), regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (*New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. Rep. 418), providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made (*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. Rep. 289), and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent. *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311, 42 L. Ed. 759, 18 Sup. Ct. Rep. 335. In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce.

But for the reason that these laws were considered unreasonable and to unnecessarily hamper commerce between

Cleveland, C., C. & St. L. Ry. Co. v. People *ex rel.* Jett

the states, we have felt ourselves constrained in a large number of cases to express our disapproval of such as provided for taxing directly or indirectly the carrying on or the profits of interstate commerce. We have also held to be invalid a statute of Louisiana requiring those engaged in interstate commerce to give all persons upon public conveyances equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color (*Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547), another regulating the charges of railway companies for passengers or freight between places in different states (*Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4), another requiring telegraph companies to deliver despatches by messenger to the persons to whom the same are addressed, so far as they attempted to regulate the delivery of such despatches at places situated in another state (*Western U. Telegr. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126), and still another forbidding common carriers from bringing intoxicating liquors into the state without being furnished with a certificate that the consignee was authorized to sell intoxicating liquors in the county (*Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. Ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062).

Several acts *in pari materia* with the one under consideration have been before this court, and have been approved or disapproved as they have seemed reasonable or unreasonable, or bore more or less heavily upon the power of railways to regulate their trains in the respective and sometime conflicting interests of local and through traffic. In the earliest of these cases (*Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. Ed. 107, 16 Sup. Ct. Rep. 1096), the very statute of Illinois under consideration in this case, as construed and applied by the supreme court of that state, was held to be an unreasonable restriction upon interstate traffic, in requiring a fast mail train from Chicago to places south of the Ohio river,

Cleveland, C., C. & St. L. Ry. Co. *v.* People *ex rel.* Jett

over an interstate highway established by authority of Congress, to delay the transportation of its interstate passengers and United States mail by turning aside from its direct route and running to a station (Cairo)  $3\frac{1}{2}$  miles away from a point on that route, and back again to the same point, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for whom the railroad company furnished other and ample accommodation. Said MR. JUSTICE GRAY: "The state may doubtless compel the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini within the state. But so long, at least, as that duty is adequately performed by the company, the state cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States."

Upon the contrary, in *Gladson v. Minnesota*, 166 U. S. 427, 41 L. Ed. 1064, 17 Sup. Ct. Rep. 627, a state statute requiring every railroad to stop all its regular passenger trains running wholly within the state at its stations in all county seats long enough to take on and discharge passengers with safety was held to be a reasonable exercise of the police power of the state, even as applied to a train connecting with a train of the same company running into another state, and carrying some interstate passengers as well as the mail. The case was distinguished from that of the *Illinois C. R. Co. v. Illinois* in the fact that the train in question ran wholly within the state of Minnesota, and could have stopped at the county seats without deviating from its course; and that the statute of Minnesota expressly provided that the act should not apply to through trains entering the state from any other state, or to transcontinental trains of any railroad. Speaking of police regulations for the government of railroads while operating roads within the jurisdiction of the state, it was said that "they are not in themselves regulations of interstate commerce; and it is only when they operate as

Cleveland, C., C. & St. L. Ry. Co. v. People *ex rel.* Jett

such in the circumstances of their application and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States." The railroad in this case was treated as a purely domestic corporation, notwithstanding it connected, as most railroads do, with railroads in other states.

In the most recent case upon this subject (*Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. Rep. 465), a statute of Ohio providing that every railroad company should cause three of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village containing over 3,000 inhabitants, for a time sufficient to receive and let off passengers, was held to be, in the absence of legislation by Congress upon the subject, consistent with the Constitution of the United States, when applied to trains engaged in interstate commerce through the state of Ohio. In delivering the opinion of the court MR. JUSTICE HARLAN observed: "The statute does not stand in the way of the railroad company running as many trains as it may choose between Chicago and Buffalo without stopping at intermediate points, or only at very large cities on the route, if in the contingency named in the statute the required number of trains stop at each place containing 3,000 inhabitants long enough to receive and let off passengers. It seems from the evidence that the average time required to stop a train and receive and let off passengers is only three minutes. Certainly the state of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers traveling through the state between points outside of its territory. . . . It was for the state to take into consideration all the circumstances affecting passenger travel within its limits, and as far as practicable make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide for the convenience of persons desiring to travel from one point to another in the

Cleveland, C., C. & St. L. Ry. Co. v. People *ex rel.* Jett

state on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the state to places beyond its limits, or the convenience of those outside of the state who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who wished to pass through the state without stopping." This case is readily distinguishable from the one under consideration, in the fact that the statute of Ohio required only that three regular passenger trains should stop at every station containing 3,000 inhabitants, leaving the company at liberty to run as many through passenger trains exceeding three per day as it chose, without restriction as to stoppage at particular stations. In other words, it left open the loophole which the statute of Illinois has effectually closed.

The question broadly presented in this case is this: Whether a state statute is valid which requires every passenger train, regardless of the number of such trains passing each way daily and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train designated especially for local traffic may stop at the same station within a few minutes before or after the arrival of the train in question.

The demurrer to the answer admits that the railway company furnishes a sufficient number of regular passenger trains (four each way a day), to accommodate all the local and through business along the line of the road, and that all of such trains stop at Hillsboro; that none of such trains have been taken off, and all of which ran prior to the putting on of the Knickerbocker Special still run and still stop at Hillsboro, and that they furnish ample and sufficient accommodation to all persons desiring to travel to and from that place; that the Knickerbocker Special was put on in response to an urgent demand on the part of the through traveling public from St. Louis to New York, and that it was neces-

Cleveland, C., C. & St. L. Ry. Co. v. People *ex rel.* Jett

sary, as the passenger trains theretofore used could not, by reason of stopping at way stations, make the time required for eastern connections, and if compelled to stop at county seats the company will be compelled to abandon the train, to the great damage of the traveling public and to the railway company.

It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might, in some cases, render it impossible for trunk lines running through the state of Illinois to compete with other lines running through states in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats it is difficult to see why the legislature may not compel them to stop at every station,—a requirement which would be practically destructive of through travel, where there were competing lines unhampered by such regulations. While, as we held in the Lake Shore Case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths, or the excellence of their tables would insure them such share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this; the railway and steamship companies are anxious in their own inter-

Cleveland, C., C. & St. L. Ry. Co. v. People *ex rel.* Jett

ests to furnish it, and local legislation ought not to stand in the way of it.

With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable, and an infringement upon that provision of the Constitution which we have held requires that commerce between the states shall be free and unobstructed.

While the statute in question is operative only in the state of Illinois, it is obnoxious to the criticism made of the Louisiana statute in *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547, that "while it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. . . . If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others." The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when running through crowded thoroughfares; requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and time tables to be posted at proper places, and other similar requirements contributing to the safety, comfort, and convenience of their patrons,—is too obvious to require discussion. *Railroad Commission Cases*, 116 U. S. 307, 334, *sub nom.*; *Stone v. Farmers' Loan & T. Co.*, 29 L. Ed. 636, 645, 6 Sup. Ct. Rep. 334, 388, 1191.

We are of opinion that the act in question is a direct burden upon interstate commerce, and *the judgment of the*

Baltimore & O. S. W. Ry. Co. v. Hausman

*supreme court of the state of Illinois must therefore be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.*

MR. JUSTICE BREWER and MR. JUSTICE SHIRAS concurring :

We concur in this judgment on the proposition that the act of the legislature of Illinois, whether reasonable or unreasonable, wise or foolish, is, as applied to the facts of this case, an attempt by the state to directly regulate interstate commerce, and, as such attempt, is beyond the power of the state.

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BALTIMORE & O. S. W. RY. CO.

v.

HAUSMAN.

(*Court of Appeals of Kentucky, Jan. 15, 1900.*)

**Injury to Passenger—Collision—Presumption of Negligence—Instructions.\***—Whenever it is shown that a railroad ran two trains upon the same track in opposite directions, and a passenger on one of them was injured by their collision, his *prima facie* right to recover is established, and, in an action for such an injury, where there is nothing in the pleading or proof to exonerate the railroad, and it appears from the testimony of one of its witnesses that the accident was due to its negligence, it is not error to instruct, that defendant admits its liability, if the passenger was injured by the collision.

**Province of Jury.**—The jurors are the judges as to the credibility of witnesses, and the weight to be given their testimony.

**Excessive Verdict.**—\$6,650 was not an excessive verdict for injuries to a commercial traveler of about 50 years of age earning about \$100.00 a month, where, as the result of the injuries, he is compelled, 18 months after the accident, to walk on a crutch, and is unable to work, was confined to his room for many weeks, and suffered much mental and physical pain.

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\*See notes at end of case.



Baltimore &amp; O. S. W. Ry. Co. v. Hausman

APPEAL by defendant from Jefferson county law and equity division circuit court. *Affirmed.*

*Gibson & Marshall*, for appellant.

*Pryor, O'Neal & Pryor*, for appellee.

PAYNTER, J. The appellant company operated a line of railway between Cincinnati, Ohio, and Louisville, Ky. On the evening of December 30, 1895, the appellee, whose occupation was that of a commercial traveler, took passage on one of the appellant's trains at Cincinnati for Louisville. A short distance out of Cincinnati, at Coal City, the train upon which the appellee was traveling had what was known as a "head-end collision" with a passenger train coming from the west over the appellant's road, resulting in the death of some of those on the train and the injury of the appellee. The appellee claims that, among other injuries, two of his ribs and one of his knees were broken, causing him great suffering in mind and body, and which injury in his knee is permanent, and that he has been unable to walk, except with the aid of a crutch, since the injuries. He also claims that he incurred expenses by reason of the injuries, and that he has been unable to perform any labor since receiving them. This trial took place nearly 18 months after the accident, and resulted in a judgment and verdict of \$6,650 for the appellee. On this appeal two grounds are urged for a reversal. One is that the court erred in instructing the jury; the other, that the finding of the jury was flagrantly against the weight of the evidence. The instruction complained of is as follows: "Defendant admits its liability to plaintiff if plaintiff received any personal injury by reason of, and at the time of, the railroad collision mentioned in the pleadings." It is insisted that the instruction was erroneous, because it recites that the appellant admitted its liability to the appellee, etc. The petition avers the collision as above stated, and the answer did not deny that such collision took place. Both the witnesses for the appellant and appellee prove that the collision took

## Baltimore &amp; O. S. W. Ry. Co. v. Hausman

place, and one of the witnesses for the appellant told what caused the accident, which showed the appellant was guilty of negligence. There is nothing in the pleadings or proof to exonerate the appellant from liability to the appellee in the event he sustained injuries by reason of the collision. Whenever it is shown that a railroad company puts two trains upon the same track, running towards each other from opposite directions, and they collide, and a passenger is injured by reason thereof, his *prima facie* right to recover is established. We are of the opinion that the court did not err in giving the instruction complained of. Counsel insists with much earnestness that the verdict of the jury is flagrantly against the weight of the evidence. In view of that fact, and that counsel assailed appellee's integrity as a claimant and as a witness, we have examined with great care the testimony. There is considerable conflict in the testimony of laymen and of doctors,—laymen as to what occurred at the scene of the accident and on the arrival of the appellee at Cincinnati; doctors as to the character and extent of the appellee's injuries. The jurors were the judges as to the credibility of the witnesses and the weight to be given their testimony. We have reached the conclusion that the jury could not have done otherwise, from the evidence, than return a verdict for the appellee. There is no evidence that the appellee was injured except by the collision, and after a lapse of 18 months he has been compelled to walk upon a crutch, and has been unable to perform any labor. He was confined to his room for many weeks, and suffered greatly from his injuries, and we are of the opinion that the verdict of the jury should not be disturbed. He was a man 50-odd years of age, and had been a commercial traveler for some years, earning about \$100 per month. Considering the character of his injuries, the mental and physical suffering which he endured, his ability to earn money, and the reduction, if not the destruction, of his ability to

Injury to Passenger—Collision—Presumption of Negligence—Instructions.

Province of Jury.

Excessive Verdict.

## Notes

make a living, we do not think that the verdict returned was excessive. The judgment is affirmed.

## NOTES.

**Injury to Passenger in Collision between Trains—Presumption of Negligence.**—As a general rule, whenever a passenger is injured in a collision of railroad trains a presumption of negligence arises. *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 49 Fed. Rep. 209, 4 U. S. App. 109, 1 C. C. A. 231; *Chicago City R. Co. v. Engel*, 35 Ill. App. 490; *West Chicago St. R. Co. v. Martin*, 47 Ill. App. 610; *Louisville, N. A. & C. R. Co. v. Taylor*, 12 Ind. 126; *Graham v. Burlington, C. R. & N. R. Co. (Minn.)*, 34 Am. & Eng. R. Cas. 397; *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242; *Magoffin v. Missouri Pac. R. Co.*, 102 Mo. 540; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, 3 Am. & Eng. R. Cas. 361; *Delaware, L. & W. R. Co. v. Napheys (Pa.)*, 1 Am. & Eng. R. Cas. 52; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. St. 351, 6 Am. & Eng. R. Cas. 407; *Skinner v. London, B. & S. C. R. Co.*, 5 Exch. 787.

But if one injured by a collision of the cars of two railroad companies while a passenger of one company, and brings his action against the other, he must prove that the latter alone was chargeable with the negligence in consequence of which the injury occurred. *People's Pass. R. Co. v. Lauderbach (Pa.)*, 26 Am. & Eng. R. Cas. 166. And in an action by a passenger of one carrier against the other carrier for injuries caused by a collision between both, he must prove negligence against the defendant. No presumption of negligence arises against such carrier from the fact of the injury. *Tompkins v. Clay St. Hill R. Co.*, 66 Cal. 163, 18 Am. & Eng. R. Cas. 144.

**Injuries to Passengers—Presumption of Negligence.**—See generally *Sanders v. Southern Ry. Co. (Ga.)*, 14 Am. & Eng. R. Cas., N. S., 281, and notes, 289 *et seq.*

**Same—Same—Illustrations of What May Give Rise to Presumption.**—See notes, 12 Am. & Eng. R. Cas., N. S., 173 *et seq.*

**Same—Same—Derailment.**—See *McCafferty v. Pennsylvania R. Co. (Pa.)*, 16 Am. & Eng. R. Cas., N. S., 122, and extensive note, 126 *et seq.*

Chamberlain v. Lake Shore & M. S. Ry. Co

CHAMBERLAIN

v.

LAKE SHORE & M. S. RY. CO.

(*Supreme Court of Michigan, Dec. 21, 1899.*)

**Ejection of Passenger—Evidence—Records of Former Suit.**—In an action for the ejection of a passenger for refusing to pay more than the fare fixed by law, the files and records of a former suit against the carrier for an ejection of the passenger, under exactly the same circumstances, were admissible in evidence; as defendant knew from the rulings of such suit that it had no right to make such second ejection, and the second wrong to the passenger was, therefore, an aggravated one.

**Same—Elements of Damage—Excessive Verdict.\***—Such second ejection was in the presence of a number of other passengers, and the passenger was compelled thereby to walk about 5 miles. *Held*, that substantial damages were properly given, and a verdict of \$650 was not excessive.

**Remarks of Counsel.**—In such an action, a verdict for plaintiff will not be reversed because of improper remarks, outside the record, of his counsel, in arguments before the jury, where it appears that defendant has not been substantially injured.

**ERROR** by defendant to Monroe county circuit court.  
*Affirmed.*

*C. E. Weaver* (*Geo. C. Greene* and *O. G. Getzen-Danner*, of counsel), for appellant.

*Willis Baldwin*, for appellee.

LONG, J. October 28, 1895, plaintiff was ejected from defendant's train between Flatrock and Trenton for refusing to pay a fare of 25 cents. He tendered 19 cents fare, which was refused, and defendant's conductor ejected him. He had been accustomed to travel over this line Case Stated. once a week or once in two weeks for a number of years, and had been compelled to pay 25 cents between

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\*See *Louisville & W. R. Co. v. Hine* (Ala.), 14 Am. & Eng. R. Cas., N. S., 382, and *note*, 391.

*Chamberlain v. Lake Shore & M. S. Ry. Co*

these two points. The distance between these places is somewhat in dispute; the plaintiff claiming that it is only 6.3 miles, while defendant claims it to be 6.48 miles. On the trial, however, the time-table of the defendant was offered in evidence, from which it appears that the distance therein stated is 6.3 miles. It is admitted that the defendant company has no right to charge more than 3 cents per mile. In either view of the case, however, the defendant had no right to charge 25 cents. The utmost that could be charged, even upon the defendant's theory that the distance was 6.48 miles, would be 19 cents. Calling the distance that number of miles, at 3 cents per mile would be 19.44 cents. The fraction over the 19 cents is less than one-half of 1 cent. In *Zagelmeyer v. Railroad Co.*, 102 Mich. 214, 60 N. W. 436, the statute fixing rates of railroad fare within this state (Act No. 202, Laws 1889) was under consideration, and it was said: "This language would apparently not permit a charge for a fraction of a mile unless it was so large a fraction as to make the charge one cent or more, not in excess of the three cents per mile. The statute formerly provided that the price of tickets might, for convenience in making change, be fixed at that multiple of five which was nearest the exact amount of fare. But the present statute (Act No. 202, Laws 1889) contains no such provision." The plaintiff in the present case had judgment for \$650. Defendant brings error.

It appeared that in 1892 the defendant company had ejected the plaintiff because he had tendered 21 cents instead of 25 cents fare between these points. On that trial it was admitted that the distance was only 6.3 miles, and that distance only was shown by the time-table. In that case the plaintiff recovered a judgment for \$400. The case was removed to this court, and was here affirmed at the October term, 1896 (110 Mich. 614, 68 N. W. 423). That case had resulted in a judgment against defendant in the circuit court before the present case was brought. On the present trial the plaintiff offered in evidence the files and records in the former suit.

Ejection of Passenger—Evidence—Records of Former Suit.

## Chamberlain v. Lake Shore &amp; M. S. Ry. Co

This was objected to by defendant's counsel, but the court overruled the objection and admitted such files and records. This is claimed to be error. We think there was no error in this. It appears that the plaintiff had continued to pay 25 cents fare for several years prior to the former suit. In that suit it was admitted that the distance was only 6.3 miles; yet after that suit had gone to judgment, and the defendant and its officers knew by the ruling in that case that 19 cents fare was the utmost limit it could charge, it continued to demand from its passengers 25 cents fare between these points. The wrong to the plaintiff was aggravated by these facts. In *Welch v. Ware*, 32 Mich. 84, it was said; "When the law gives an action for willful wrongs, it does it on the ground that the injured person ought to receive pecuniary amends from the wrong-doer. It assumes that every such wrong brings damage upon the sufferer and that the principal damage is mental and not physical. And it assumes further that this is actual and not metaphysical damages, and deserves compensation. When this is once recognized it is just as clear that the willfulness and wickedness of the act ~~must~~ constitute an important element in the computation, for the plain reason that we all feel our indignation excited in direct proportion with the malice of the offender, and that the wrong is aggravated by it." See, also: *Warren v. Cole*, 15 Mich. 265; *Tefft v. Windsor*, 17 Mich. 486; *Brushaber v. Stegemann*, 22 Mich. 266; *Swift v. Applebone*, 23 Mich. 252; *Leonard v. Pope*, 27 Mich. 145.

Some claim is made that the damages are excessive. It appears that the plaintiff was ejected in the presence of 30 to 35 passengers, and was compelled to walk from that point to Trenton, a distance of about 5 miles. We think the circumstances of the ejection were such that the jury very properly gave him substantial damages. The court below properly guarded the rights of the defendant in this respect. He stated to the jury that "no damages can be allowed except such as have been established by the evidence in the case, and no dam-

Same—Elements  
of Damage—Ex-  
cessive Verdict.

## Chamberlain v. Lake Shore &amp; M. S. Ry. Co

ages should be allowed as matter of punishment to the railroad company."

One other question is raised which we think proper to discuss. On the closing argument by counsel for plaintiff, he said, among other things: "Little bits of outrages perpetrated upon one man at a time, a cent here, half a cent there; if a man pays five cents more than he ought in traveling a little piece of road, and another man pays ten cents more than he ought for freight,—it amounts to a good deal in a year. It amounts to very little between Flatrock and Trenton, says some one; but in twenty-five years how much would it amount to? The regular fare is nineteen cents. They have taken twenty-five cents from Flatrock to Trenton for twenty-five years. That amounts to \$5,470 that has gone into the pockets of the Lake Shore & Michigan Southern Railway Company between these two little points. Just imagine the work the farmers did along there to earn that amount. How many hours of hard work has it taken for these men to earn that? I call your attention to that because he called your attention to those things. I am calling it to your attention so that it can go into your mind and heart, and mine, and that of every man who has thought of the thing, that the little outrages from year to year gradually become all centered upon some one man, until he is so much outraged that he takes it into his hands and tries to correct the outrage against all the people. For twenty-five years between Flatrock and Trenton the people had been outraged to the extent, and had been stung, and this old man had been, not only by the outrage to himself, but to his neighbors. He felt the outrage that was going on, but he stood it a long time, as other people have stood it; and why? Why, that the railroad company's lawyers—And, by the way, during the last year, according to the report of this old road— As people grow old, they ought not to have lawsuits. As railroads grow old, they ought not to have lawsuits, unless for such things as Mr. Weaver and his associates have had in cases like this. According to the

Remarks of  
Counsel.

*Chamberlain v. Lake Shore & M. S. Ry. Co*

report, there has been a large amount of expense for lawsuits, etc.,—\$63,024.45. This is taken from somebody. Every bit of it has been taken from the people of the state of Michigan, or other parts where this railroad goes; and still Mr. Weaver would laugh at you. Mr. Weaver would laugh at you and say: 'What do you care about it? You walk about your yard,—a great, big man.' It does not cost much to make a common, ordinary devil walk five or six miles; but if the president of your railroad, Mr. Vanderbilt, who said, 'The public be damned,' had been asked to walk five or six miles, would Mr. Weaver say it was worth only five, six, or ten or one hundred dollars? Why, it would mount into the millions. He would not want a man of that kind to be put off and walk from Flatrock to Trenton for a few paltry dollars; but it is Mr. Chamberlain, an ordinary farmer, used to walking around the fields. I have walked around the fields, and I know it is no fun. Farmers do not have fun walking around the fields for earning their dollars." While some of these remarks were made in answer to the arguments of counsel for defendant, yet many others of them were not, and counsel spoke of many things outside the record. This practice of counsel has many times been condemned by this court, and the language here is deserving of the severest censure. The court below should have interposed and stopped the intemperate speech. But we are not satisfied that any substantial injury was done the defendant. The amount of the verdict is not large, when we consider the aggravated circumstances under which the plaintiff was ejected; and we are not, therefore, inclined to reverse the case because of these intemperate and ill-chosen remarks of counsel. The plaintiff was clearly entitled to recovery, and the only question was the amount of damages.

We find no substantial error in the case. The judgment must be affirmed. The other justices concurred.



## Foreman v. Pennsylvania R. Co

FOREMAN

v.

PENNSYLVANIA R. CO.

*(Supreme Court of Pennsylvania, April 30, 1900.)*

**Injury to Postal Clerk—Liability of Railroad—Statute.\***—A postal clerk in the employ of the United States Post-Office Department, when traveling on railroad trains in the pursuance of his duties, is not a passenger within the meaning of the statute of Pennsylvania providing, in substance, that the right of action or recovery for injuries sustained by a person not a passenger nor an employee of the railroad, while he is lawfully employed on a railroad train, shall be only such as would exist if he were an employee of the railroad.

**Same—Open Switch—Negligence—Sufficiency of Evidence.**—The contention that there ought to have been a signal at the switch, where the accident occurred by reason of its being negligently left open, and, therefore, the defendant was guilty of negligence, was not tenable.

**APPEAL** by plaintiff from Huntingdon county court of common pleas. *Affirmed.*

*W. McK. & R. W. Williamson*, for appellant.

*W. & J. D. Dorris*, for appellee.

**PER CURIAM.** The present case is identical in character with the case of *Railroad Co. v. Price*, 96 Pa. St. 256, 1 Am. & Eng. R. Cas. 234, and is ruled by it. We have no desire or intention to overrule that decision. The contention that there ought to have been a signal at the switch, and therefore the defendant was guilty of negligence, is not tenable, as there was no evidence that the absence of a signal

**Injury to Postal  
Clerk—Liability  
of Railroad—  
Statute.**

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\*See *Louisville & N. R. Co. v. Kingman* (Ky.), 5 Am. & Eng. R. Cas., N. S., 401, and *note*, 405 *et seq.*

Brown v. State

caused the accident, or in any way contributed to it, and there was an abundance of proof that the switch was a standard lever switch in general use along the whole line of this branch road. The charge of the court below was a correct presentation of the case, and binding instruction to the jury to find for the defendant, and was in conformity with the evidence and the law. Judgment affirmed.

Same—Open  
Switch—Negli-  
gence—Suffi-  
ciency of Evi-  
dence.

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BROWN

v.

STATE.

(*Supreme Court of Georgia, May 12, 1900.*)

Colored Passenger "Remaining" in Car for White Passengers—Construction of Penal Statute.—Though the only purpose of a passenger upon a railroad train, in entering a car which had been set apart for passengers of another race, may have been to pass through the same in order to reach a car to which he had been assigned, and in which he had been previously riding, yet if, upon being requested by the conductor to leave the car so entered, he refused to do so, declared he would ride where he pleased, and that the conductor had no right to put him out, and was thereupon ejected from that car, such passenger was guilty of the forbidden act of "remaining" in a car other than that to which he had been assigned, and therefore liable to prosecution under section 528 of the Penal Code.

(Syllabus by the Court.)

ERROR by defendant from Washington county superior court. *Affirmed.*

*Evans & Evans* and *M. G. Bayne*, for plaintiff in error.

*B. T. Rawlings, Sol. Gen.*, for the State.

LUMPKIN, P. J. Section 526 of the Penal Code requires railroad companies doing business in this state to furnish

## Brown v. State

equal accommodations, in separate cars, or compartments of cars, for white and colored passengers. Section 527 makes it the duty of conductors or other employees in charge of such cars to assign passengers to their respective cars or compartments, and confers upon the servants of railroad companies the necessary police powers to carry out the provisions of these two sections. Section 528 declares that "any passenger remaining in any car or compartment or seat, other than that to which he may have been assigned, shall be guilty of a misdemeanor," and empowers conductors and other railroad employees to eject from a train or car any passenger who refuses to remain "in such car or compartment or seat as may be assigned to him." The plaintiff in error was convicted in the county court of Washington county of violating the provisions of the section last mentioned, and thereupon sued out a *certiorari* to the superior court, to the overruling of which he excepted. The only question presented for determination by this court is whether or not the evidence warranted the judgment of guilty rendered by the county judge, who tried the case without a jury. At the trial it appeared that an excursion train, upon which both white and colored people were transported, was run from Savannah to Macon. Before leaving Savannah, the colored passengers were assigned to two of the cars composing the train, and the white passengers to another of them. The train was so arranged that the car for the white people was placed between the two cars provided for the colored people. At a point in Washington county, Brown left the rear car, in which colored people were riding, and entered the car in which the white passengers were seated. The conductor, with the aid of a passenger whom he called to his assistance, forcibly ejected Brown from the car thus entered by him, and the grand jury subsequently indicted him for "remaining" in that car after having been assigned to another. As to the facts above recited there was practically no controversy. It is inferable from the testimony of the conductor that Brown had

## Brown v. State

been assigned in Savannah to the rear car set apart for colored people. According to his statement, however, he had been assigned to the front car provided for people of his race. His contention was that, having at some point on the journey left the front car and gone into the rear car, he was proceeding to go from the latter to the former, and had for this purpose only entered the intermediate car occupied by white people, when he was accosted by the conductor and requested to leave the same. There was, however, evidence for the state to the effect that, when this request was made, Brown, with an oath, refused to leave the car, declaring that he had paid his fare and had a right to ride where he pleased, and that he was thereupon ejected from the car. It makes no difference whether, in point of fact, Brown's proper place was in the front or in the rear car set apart for colored people. In neither event was it lawful for him to "remain" in the car provided for white people, after being requested by the conductor to leave the same. Giving the accused the full benefit of the theory that he entered the white people's car with no intention except to pass through the same, and would have done so if he had not been interrupted, the above-recited evidence as to what actually occurred when the conductor accosted him warranted the conclusion that he committed the misdemeanor forbidden by section 528 of the Penal Code. He, it is true, denied the correctness of that version of the matter; but we must deal with the case upon the assumption that the jury, as it was their right to do, believed the state's witnesses. If, when requested by the conductor to leave the white people's car, the accused had promptly proceeded to do so, as required, we are not prepared to say he would have been a criminal merely because of the fact that he had unlawfully entered this car. The gist of the offense is remaining in a car other than the one to which a passenger may have been assigned, and the state's evidence warranted a finding that the plaintiff in error did remain in a car other than that to which he had been assigned. His refusal to leave the car,

Abraham v. Oregon & C. R. Co

accompanied by the positive assertion of a right to ride therein, and resistance to the conductor's effort to evict him, certainly was remaining, and the length of time he remained was, of course, immaterial. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

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ABRAHAM

v.

OREGON & C. R. Co. *et al.*

(*Supreme Court of Oregon, April 23, 1900.*)

**Deeds — Parole Evidence — "Railroad Purposes"\* — Railroad Hotels.**—Where land is deeded to a railroad company to be used for "all legitimate railroad, depot, and warehouse purposes," it is not competent to show by parole evidence that the deed was not intended to, and did not, convey to the company the right to erect and maintain on the land a hotel which appears reasonably necessary for the convenience of its passengers and employees.

**Whether Maintenance of Hotel a Railroad Purpose.**—But it cannot be held, as matter of law, that the maintenance of a hotel which is not necessary to, and does not add to the comfort, convenience, or safety of railway passengers or employees, but is for the accommodation of the public at large, is a legitimate railroad purpose.

**APPEAL** by plaintiff from Douglas county circuit court.  
*Reversed.*

The first cause of suit, in substance, is: That on the 28th of February, 1883, the plaintiff and W. R. Willis conveyed to the defendant the Oregon & California Railroad

Case Stated. Company certain premises described in the complaint, by an ordinary warranty deed, the *habendum* clause of which is as follows: "To have and to hold the same, with all the privileges and appurtenances

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\*See notes at end of case.

Abraham v. Oregon & C. R. Co

thereto belonging, to the said railroad company, its successors and assigns, forever, for the purpose of building and maintaining a railroad thereon, and to use the same for all legitimate railroad, depot, and warehouse purposes." At the time of the execution of the deed the plaintiff and Willis were the owners of a large track of land at what is now known as "Glendale," in Douglas county, and adjoining the land conveyed to the railroad company, which they subsequently laid off and platted as a town; and soon thereafter the plaintiff, who in the meantime had succeeded to Willis' interest, constructed and built thereon a hotel adequate to the wants and conveniences of the passengers of the defendant company, the traveling public, and local custom. Thereafter, and on or about the 1st of July, 1887, the Oregon & California Railroad Company leased to the defendant the Southern Pacific Company all of its railroad and railroad properties in the state of Oregon, including the depot grounds at Glendale, and on or about the 1st of August, 1887, the Southern Pacific Company leased to the defendant Clarke a portion of the land conveyed to the Oregon & California Railroad Company by the deed of February 28, 1883, "and has caused, procured, and suffered said defendant Clarke to erect thereon a hotel for the accommodation of the general public, and incidentally as an eating house for the passengers upon the train of the Southern Pacific Company, and the said defendant Clarke is now, and ever since to the 1st day of October, 1897, has been, carrying on and conducting upon the said leased premises a hotel for the accommodation of the traveling public and local custom; the said Southern Pacific Company having caused, procured, and suffered a hotel building to be erected and maintained upon said leased premises for that purpose. That the principal business of said hotel and eating house so erected and maintained is the local custom and patronage of an ordinary and general hotel incident to the town of Glendale. That it derives some support from the passengers of the Southern Pacific Company, but said support is not its principal busi-

## Abraham v. Oregon &amp; C. R. Co

ness. That the trains of said Southern Pacific Company do not stop at said station of Glendale regularly for meals, and have never done so since the erection of said hotel, and but rarely stop for meals, and then only when its trains are at least 1 ½ hours late. That the said Southern Pacific Company has a regular eating station and eating house at Ashland, Oregon, sufficient to accommodate its passengers, and it is not necessary, and does add to the convenience of its passengers, to have one at Glendale. That, by reason of the construction and operation of said hotel and eating house upon said depot grounds by the defendant as hereinbefore set out, the hotel of plaintiff is rendered practically valueless for the purposes for which it was constructed." It is averred that at the time of the execution of the deed to the railroad company it was expressly understood and agreed by and between the parties thereto that the words "legitimate railroad, depot, and warehouse purposes," as used therein, should not mean or indicate a hotel or eating house, and such deed was made and accepted with the understanding that the premises conveyed should be limited in their uses, and were not granted for the purpose of building or maintaining either an eating house or hotel thereon; that the defendants the Southern Pacific Company and Clarke had full notice and knowledge of the claim of plaintiff relative thereto at the time the lease was made, and the hotel or boarding house constructed. For a further and separate cause of suit the complaint alleges, in substance, that on or about the 2d day of May, 1883, the legal title to certain lands near the depot grounds referred to was in Willis, although plaintiff was the owner of an undivided half thereof; that, at the date referred to, Willis and his wife, by an instrument in writing, conveyed to the Oregon & California Railroad Company the right to take from a certain stream on the premises owned by the plaintiff and Willis all the water that would flow through a three-inch pipe from a certain designated point to the water tank of the railroad company, in consideration of which the company granted to Willis and his

## Abraham v. Oregon &amp; C. R. Co

assigns the right to tap the tank by a pipe three inches in diameter, and to thereby take all the water therefrom, beyond the amount needed by the defendant corporation to supply its locomotives; that on or about the 8th of May, 1885, the plaintiff purchased and succeeded to all the rights of Willis in and to the premises referred to, and all his rights under such agreement; that on or about the 1st of November, 1897, the defendants the Southern Pacific Company and Clarke caused a pipe to be laid and connected with the water tank referred to, and thereby conducted the water to the hotel built upon the depot grounds, and ever since such time have been, and now are, using the water from said tank, to plaintiff's damage in the sum of \$250. The complaint concludes with a prayer for a decree enjoining and restraining defendants from carrying on or permitting to be carried on the eating house or hotel referred to, and from using from the water tank described any other or greater amount of water than necessary to supply the locomotives of the defendant railroad company.

*J. C. Fullerton and Albert Abraham, for appellant.*

*W. T. Muir, for respondents.*

BEAN, J. (after stating the facts). This is not a suit to correct or reform a deed, and hence there are but two questions for decision on this appeal: First, whether, under the allegation that, at the time the deed was made by the plaintiff and Willis to the Oregon & California Railroad Company, it was understood and agreed that the words "for all legitimate railroad, depot, and warehouse purposes" should not mean or include a hotel or eating house, plaintiff is entitled to an injunction restraining the defendants from maintaining a hotel on the premises conveyed, because in violation of the terms of the grant; and, second, if not, whether the hotel constructed and now maintained by the defendants the Southern Pacific Company and Clarke is for "legitimate railroad purposes." Considerable discussion was had at the argument as to whether the deed in question



*Abraham v. Oregon & C. R. Co*

conveyed to the railroad company the fee of the land therein described, or a mere easement therein. But, for the purposes of this appeal, that question is immaterial. In any event, the grant was for legitimate railroad, depot, and warehouse purposes only. *Breckinridge v. Railroad Co.* (N. J. Ch.) 33 Atl. 800; *Robinson v. Railroad Co.*, 59 Vt. 426, 10 Atl. 522; *Thornton v. Trammell*, 39 Ga. 202. We come, then, directly to a consideration of the question as to whether parol evidence is admissible to show that the words "legitimate railroad purposes" were used in the deed in a particular sense. It is an elementary rule of law that parol evidence cannot be admitted to contradict or vary a written instrument; and it is equally well settled that parol evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used. Mr. Greenleaf, after stating the rule that parol evidence is always receivable to define and explain the meaning of words in a contract which are purely technical or local, or which have two meanings,—the one common and universal, and the other technical or local,—or where words and phrases are used in a peculiar sense by members of a particular religious sect, says: "But beyond this the principal does not extend. If, therefore, a contract is made in ordinary and popular language, to which no local or technical and peculiar meaning is attached, parol evidence, it seems, is not admissible to show that in that particular case the words were used in any other than their ordinary and popular sense." 1 Greenl. Ev. (15th Ed.) § 295. And LORD CHIEF JUSTICE TINDAL says: "The general rule I take to be that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves, and that in such case evidence

Abraham v. Oregon &amp; C. R. Co

dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if at some future period parol evidence of the particular meaning which the party affixed to his words. or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself." *Shore v. Wilson*, 9 Clark & F. \*355, \*565. And MR. JUSTICE CLIFFORD, in *Moran v. Prather*, 23 Wall. 492, 501, 23 L. Ed. 123, speaking in reference to the same subject, says, "Ambiguous words or phrases may be reasonably construed to effect the intention of the parties, but the province of construction, except when technical terms are employed, can never extend beyond the language employed, the subject-matter, and the surrounding circumstances." It is therefore not competent for either of the parties to a contract, where its language is plain and unambiguous, to prove by parol evidence how it was understood, or the meaning of the words used. 1 Rice, Ev. 250; *Kemble v. Lull*, 3 McLean, 272, Fed. Cas. No. 7,683; *Davis v. Shafer* (C. C.) 50 Fed. 764. Applying this rule to the case in hand, it is clear that the plaintiff cannot show by parol testimony that the deed from himself and Willis to the railroad company was not intended to, and did not, convey to such company the right to use the property for all legitimate railroad purposes.

Deeds—Parol  
Evidence—"Rail-  
road Purposes"—  
Railroad Hotels.

It is claimed, however, on behalf of the plaintiff, that the hotel is not a legitimate or proper railroad purpose, because it is used for the accommodation of the general public, and not for the passengers and employees of the railroad company. The erection and maintenance by railway companies of hotels or eating stations at suitable and convenient places

Abraham v. Oregon &amp; C. R. Co

along their roads for the use and accommodation of their employees and passengers is not only a legitimate and proper railroad use, but almost, if not quite, a necessity, in many instances, of modern railway travel. A railway company has an undoubted right to use its property in any way the exigencies of its business or the convenience or accommodation of its passengers may require or suggest. *Gudger v. Railway Co.* (N. C.) 11 S. E. 515; *Telegraph Co. v. Rich*, 19 Kan. 517; *Gurney v. Elevator Co.*, 63 Minn. 70, 65 N. W. 136; *Railroad Co. v. Wathen*, 17 Ill. App. 582. And, in cases where hotels or eating houses appear to be reasonably necessary for the convenience of its employees and passengers, their maintenance is a legitimate railroad purpose. But an eating house or hotel kept for the accommodation of the general public, and not as an incident to the operation and management of the railway, cannot be so considered.

Whether Maintenance of Hotel a Railroad Purpose.

As to whether a given hotel or eating house is maintained for railroad purposes is therefore largely a mixed question of law and fact, to be determined from the circumstances of each particular case. The question as to when and under what circumstances a hotel is a necessary or legitimate railroad use or purpose is quite fully considered in *Milwaukee & St. P. Ry. Co. v. Board of Sup'rs of Crawford Co.*, 29 Wis. 116; *Same v. City of Milwaukee*, 34 Wis. 271; *Chicago, M. & St. P. Ry. Co. v. Board of Sup'rs of Crawford Co.*, 48 Wis. 666, 5 N. W. 3; and, within the doctrine of these cases, we are of the opinion that, under the allegations of the complaint, the operation of the hotel in question cannot be held, as a matter of law, to be a "legitimate railroad purpose," and within the terms of the grant from the plaintiff, because it is alleged that it is not necessary, and does not add to the comfort, convenience, or safety of the railway passengers, but is for the accommodation of the general public. It seems to us, therefore, the demurrer should be overruled, and the case tried upon its merits, so that the court, aided by the

## Notes

testimony, can determine whether the hotel is in fact a legitimate railroad purpose.

But little need be said in reference to the second cause of suit. The complaint does not show any injury to the plaintiff by the alleged violation of the contract pleaded. It is nowhere alleged that he ever attempted to avail himself of the right given by the contract, although a period of 16 years has elapsed since its execution; nor is it averred that he has any use for the water, or is damaged or injured in any way by its alleged diversion. It follows that the decree of the court below must be reversed, the demurrer overruled, and the cause remanded for further proceedings consistent with this opinion, and it is so ordered.

## NOTES.

**Power of Railroad to Run Hotel.**—The company is not authorized by its charter to build and conduct hotels for the accommodation of the public generally, but as hotels for the accommodation of its passengers are necessary to its business, they are therefore within its charter, which would include its Cumberland and Viaduct hotels, being mainly designed for the accommodation of passengers and for ticket and telegraph offices and waiting-rooms; and under its general charter, exempting its stock from taxation, the gross receipts of these hotels are exempt; but its Oakland and Deerpark hotels, being used primarily as summer resorts, and not being necessary to the operation of the road, are not so exempt; but they can only be taxed as other real property and are not liable to a tax on their receipts, under the Maryland act of 1872, ch. 234. *State v. Baltimore & O. R. Co.*, 48 Md. 49. *In re Rochester, etc., R. Co.* (N. Y. Sup. Ct.), 12 N. Y. Supp. 566, it was held that a railroad company cannot invoke the right of eminent domain for the purpose of opening a highway a third of a mile in extent, from its depot grounds to a hotel, even though the hotel may be a popular place for refreshment, and all the patrons of the road may desire to visit it.

**POWER OF RAILROAD TO ACQUIRE LAND—RAILROAD PURPOSES.**

**General Rule.**—It may be stated as a general rule that a railroad may acquire and hold all land necessary to enable it to carry on its business.

## Notes

Under this rule a railroad may acquire land for the following purposes:

**Spur Track.**—See 13 Am. & Eng. R. Cas., N. S., 448, *note*.

**Depots—Stations and Station Grounds.**—Protzman *v.* Indianapolis & C. R. Co., 9 Ind. 467; Red *v.* Louisville Bridge Co., 8 Bush (Ky.) 69; Hamilton *v.* Annapolis & E. R. R. Co., 1 Md. 533; Graham *v.* C. & N. J. C. R. R. Co., 36 Md. 463; Mansfield C. & I. M. R. Co. *v.* Clark, 23 Mich. 519; Weir *v.* St. Paul, S. & T. F. R. R. Co., 18 Minn. 155; Hannibal & St. J. R. R. Co. *v.* Meeder, 49 Mo. 165; N. Y. & H. R. R. Co. *v.* Kip, 46 N. Y. 546, 67 N. Y. 227; Rensselaer & S. R. R. Co. *v.* Davis, 43 N. Y. 137; *In re* New York Central & H. R. R. Co., 77 N. Y. 248; Susq. *v.* C. W. & Q. R. Co., 4 Ohio St. 308; Giesy *v.* Cincinnati, W. & Z. R. Co., 4 Ohio St. 308; Cumberland Valley R. R. Co. *v.* McLanahan, 59 Pa. St. 23; South Carolina R. R. Co. *v.* Blake, 9 Rich. (S. Car.) 228; Nashville & C. R. Co. *v.* Cowardin, 11 Hump. (Tenn.) 348.

**Additional Tracks on Whole Line.**—*In re* N. Y. Cent. R. R. Co., 67 Barb. 426.

**Stock Yards.**—*In re* New York Central R. R. Co., 63 N. Y. 326; Covington Stock-Yards Co. *v.* Keith, 139 U. S. 128.

**Construction of Telegraph alongside Right of Way.**—Telegraph Co. *v.* Rich, 19 Kan. 517; Prather *v.* Jeffersonville, M. & I. R. R. Co., 52 Ind. 16.

**Space to Pile Lumber and Other Material Transported.**—Lance's Appeal, 55 Pa. St. 16; Cumberland Valley R. R. Co. *v.* McLanahan, 59 Pa. St. 23.

**Repair Shops.**—Southern Pac. R. R. Co. *v.* Raymond, 53 Cal. 223; Low *v.* Galena & C. U. R. Co., 18 Ill. 324; Chicago B. & Q. R. Co. *v.* Wilson, 17 Ill. 213; Hannibal & St. J. R. R. Co. *v.* Meeder, 49 Mo. 165; State *v.* Mansfield, 3 Zab. 1 N. J. 510; Virginia & T. R. R. Co. *v.* Elliott, 5 Nev. 358.

**Dumping Grounds for Waste Earth.**—Lodge *v.* Phila. W. & Balt. R. R. Co., 8 Phila. 345.

**Springs to Supply Tanks.**—Stronecker *v.* Alabama & C. R. Co., 42 Ga. 509.

**Turnouts and Extra Tracks.**—Mississippi R. R. Co. *v.* Devaney, 42 Miss. 555; *In re* N. Y. Central R. R. Co., 67 Barb. 426; Toledo & W. R. R. Co. *v.* Daniels, 16 Ohio St. 390; Phila., W. & B. R. R. Co. *v.* Williams, 54 Pa. St. 103; Cleveland & P. R. R. Co. *v.* Speer, 56 Pa. St. 325.

**Viaduct and Approaches.**—A duty imposed upon a company carries with it the power to perform it; and when required by its charter to construct a viaduct and approaches for the purpose of carrying a street under its railroad, it may condemn land for the same, such

## Notes

land being as much taken for the purposes of the corporation as land taken for its roadbed. *State v. St. Paul, M. & M. R. Co.*, 35 Minn. 131, 28 N. W. Rep. 3.

**Channel to Change Course of Stream.**—A railroad company may, under chapter 191, Laws of Iowa 1880, condemn land for right of way for a channel to change the course of a stream, where the safety of the traveling public would be promoted thereby. For such object the land would be taken for a public use, authorizing the exercise of the right of eminent domain, and for that purpose the statute is not unconstitutional. Whether such right exists where merely the convenience and economy of the company would be promoted, not determined. *Reusch v. Chicago, B. & Q. R. Co.*, 11 Am. & Eng. R. Cas. 559, 57 Iowa 687, 11 N. W. Rep. 647.

**PURPOSES FOR WHICH RAILROAD CANNOT ACQUIRE LAND.**

**Temporary Right of Way during Construction of Main Line.**—*Carrier v. Marietta & C. R. Co.*, 11 Ohio St. 228; *Gray v. Liverpool & Burg. Ry.*, 9 Beav. 391.

**Lateral or Branch Road in Absence of Charter Provision.**—*Works v. Junction R. Co.*, 5 McLean (U. S.) 425; *Knight v. Carrollton R. Co.*, 9 La. Ann. 284; Baltimore, etc., Turnpike Co. *v.* Union R. Co., 35 Md. 224, 6 Am. Rep. 397; Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228; Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. L. 205; Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155, 4 Am. & Eng. R. Cas. 191.

And under the power to condemn land necessary for side tracks, turnouts, or switches, it has no right to take land for the construction of an independent branch road to subserve only new private interests. *South Chicago R. Co. v. Dix*, 17 Am. & Eng. R. Cas. 157, 109 Ill. 237; *Chicago & E. I. R. Co. v. Wiltse*, 24 Am. & Eng. R. Cas. 261, 116 Ill. 449, 6 N. E. Rep. 49. See also *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *State v. Hazelton, etc., R. Co.*, 40 Ohio St. 504; *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. Rep. 615; *Pittsburgh, etc., R. Co. v. Benwood Iron-Works*, 31 W. Va. 710, 36 Am. & Eng. R. Cas. 531.

**To Facilitate Prospective Business—Collateral Enterprises.**—A railroad company has been held to derive from the general terms of its charter no power to take land for speculation, nor to prevent competition, nor to aid collateral enterprises remotely connected with the road, nor to facilitate prospective business not reasonably to be expected. *Rensselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137.

This was a case where a railroad company, having one of the termini of its road on a navigable waterway extending into Canada, made application to acquire certain lands near said terminus, which they alleged would be needed in consequence of the increased busi-

## Notes

ness of the road expected to result from a ship canal which was to be cut at that point, connecting the waters already referred to with other waters. It was *held*, that the company was not entitled by virtue of the general powers in their charter contained to take possession of the land.

It has indeed been held in some cases that roads may be opened from any great coal or mining field, owned by individuals, in order to accomodate them in their business, and that this is to be deemed such a public use as will warrant in their construction an exercise of the right of eminent domain. But there are many authorities to the contrary. *Young v. McKenzie*, 3 Ga. 44; *Taylor v. Porter*, 4 Hill 146; *Buffalo & N. Y. R. R. Co. v. Brainerd*, 9 N. Y. 108; *Bradley v. N. Y. & H. H. R. R. Co.*, 21 Conn. 305; *Reeves v. Treasurer of Wood Co.*, 8 Ohio (N. S.) 344.

Where a railroad corporation sought to condemn land over which to build a switch, branch road, or lateral work, to reach a private manufactory, a steel mill, for the purpose of transporting freight to and from said steel mill over petitioner's road, the use to which the land was to be subjected was a private, not a "public, use." *Pittsburg, W. & K. R. Co. v. Benwood Iron-Works*, 36 Am. & Eng. R. Cas. 531, 31 W. Va. 710, 2 L. R. A. 680, 8 S. E. Rep. 453.

**Railroad for Carriage of Sight-Seers.**—A railroad which does not connect with a highway; which can only be reached by passing over state or private lands; which can have no habitations along, or any freight traffic over, the road; whose sole business is to convey sight-seers along the Niagara river, and the season of whose operations is confined to four months of the year, is not such a railroad corporation as is contemplated by the general railroad act of 1850, and there is no such public use as to justify the exercise of eminent domain in its behalf. *In re Niagara Falls & W. R. Co.*, 33 Am. & Eng. R. Cas. 99, 108 N. Y. 375, 15 N. E. Rep. 429, 13 N. Y. S. R. 690, 11 Cent. Rep. 272.

**Shops for Manufacture of Rolling Stock.**—*New York & E. H. R. Co. v. Kip*, 46 N. Y. 546; *Eldridge v. Smith*, 34 Vt. 484; *Walford v. C., St. P. & F. du Lac R. R.*, 14 Wis. 575; *Vt. & Can. Ry. Co.*, 1 Vt. Cent. Ry. Co., 34 Vt. 2.

**Dwellings of Employees.**—*Eldridge v. Smith*, 34 Vt. 484; *Nashville & E. R. Co. v. Cowardin*, 11 Humph. 348; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *State v. Mansfield*, 3 Zab. (N. J.) 510.

**Gravel Pits to Obtain Ballast for Road.**—*New York & C. R. R. Co. v. Gunnison*, 1 Hun (N. Y.) 496.

**Storage of Boats for Patrons.**—*In re Rochester* (N. Y. Sup. Ct.), 12 N. Y. Supp. 566.

**Wharves at Terminus.**—*Iron R. Co. v. Ironton*, 19 Ohio St. 299.

Louisville & N. R. Co. v. Scott's Adm'r

**Bridges and Approaches.**—The use of lands already condemned for use as a right of way for a railway and railway bridge, for approaches for a wagon and foot passenger bridge, is not a use for railway purposes, and is not one authorized by such first condemnation; and before the same can be used for approaches for a wagon and footway bridge, in such case, or in any way that casts an additional burden on said land, it must be condemned again by right of eminent domain, and this can only be done when authorized by the legislative power. *Payne v. Kansas & A. V. R. Co.*, 47 Am. & Eng. R. Cas. 228, 46 Fed. Rep. 546.

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LOUISVILLE & N. R. Co.

v.

SCOTT'S ADM'R.

(*Court of Appeals of Kentucky, May 2, 1900.*)

**Passengers—Riding Free by Permission of Conductor—Master and Servant.\***—A person riding in a railroad car, without paying fare, by the courtesy and permission of the conductor, although the conductor in permitting him to do so violated the company's rules, if he accepted such permission innocently, is entitled to all the rights of a passenger as to injuries sustained by him while so traveling; and the mere fact that such a passenger was accustomed to perform the duties imposed upon his sister as defendant's station agent at a certain point, and was injured while traveling for his own convenience, from such point to his home, after his labors in performing such duties had ceased for the day, was immaterial in this connection.

**Carriers of Passengers—Care Required.†**—In the carriage of passengers a railroad must use the utmost care and diligence.

**Death by Wrongful Act—Excessive Verdict.**—For the death of a man 32 years of age, of good habits, and good business ability, it cannot be held, as matter of law, that a verdict of \$9,000 is excessive.

**APPEAL** by defendant from Lincoln county circuit court.  
*Affirmed.*

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\*See notes at end of case.

†See *Smedley v. Hestonville, etc., Ry. Co. (Penn.)*, 9 Am. & Eng. R. Cas., N. S., 649, and extensive note, 652 *et seq.*



Louisville & N. R. Co. v. Scott's Adm'r

*J. W. Alcorn, Edward W. Hines, and Breckinridge & Shelby*, for appellant.

*W. G. Welch*, for appellee.

PAYNTER, J. On June 16, 1896, by the accidental derailment, at Rowland, Ky., of a train of the appellant, B. F. Scott was killed. The train consisted of a combination car and passenger coach. The passenger coach had an apartment for ladies in one end, and the other end of which was a smoker. The other car was for baggage and for colored passengers. This train left Stanford at 4 o'clock p. m., passing through Rowland for Richmond, which returned at 9:10 p. m., and in five minutes thereafter left for Stanford, a mile distant from Rowland. It had reached a point about 250 yards from the depot, when it collided with a cow, which caused the derailment of the front coach, the train backing from Rowland to Stanford. Scott got on the train at Rowland, went to Richmond, returned on the train, remained on it at Rowland, and was on it when the accident occurred. About the time the train left the station, he was in the car next to the engine; and no one seems to have seen him leave it. After the accident he was discovered under the front bolster, near the center of the front car, the car next to the engine not being derailed. The evidence does not explain how he got out of the car, but the theory of the plaintiff is that when the cow was struck he ran to the front end of the car, and was thrown therefrom, as were the conductor and brakeman. When the car started for Stanford, the conductor and a brakeman assumed their accustomed position on the front end of the car approaching Stanford, where there was an attachment which would enable them to operate the air brake on the train, and there was also a small whistle, which they used to give warning of the approach of the train at crossings. They carried lanterns, which cast a light not more than five feet in front of the train, which seemed to have been of but little assistance in discovering an object on the track. There was no pilot on the car, or headlight. Neither was the platform upon which they stood surrounded entirely by railing,

*Louisville & N. R. Co. v. Scott's Adm'r*

there being openings which were not covered by the railing or protected by chains. The train was running from six to eight miles per hour at the time of the accident. The collision derailed the front car, which ran to a point so that the rear end of the derailed coach was 105 feet from the point where the collision took place. Scott's sister was the station agent at Rowland, but he performed the duties of the position for her, she drawing the salary, and paying it to him. He began his work at 6:30 a. m., and ceased at about 4:30 p. m. In the discharge of his duties as station agent he was not required to make the trip to Richmond and return on this train. He lived at Stanford.

On the trial of the case the conductor was asked in what capacity Scott was traveling on the train, and he answered "as passenger." The defense objected to this and offered to prove by the witness that Scott did not pay his fare; that he did not have a ticket or pass on the road; that he was traveling by the courtesy and permission of the conductor; that the conductor was doing this in violation of the rules of the company. The court refused to permit this testimony to be offered, and proceeded to try the case upon the theory that Scott was a passenger on the train. We will assume, for the purpose of this case, that these facts, which were offered to be proven by the company, are true, and were proven. If these facts had been proven, it would not have deprived decedent of the character of passenger, for it is universally agreed that the payment of fare or price of carriage is not necessary to constitute one a passenger, or to give rise to a liability upon the part of the carrier. Hutch. Carr. § 565; Wood, R. R. (Minor's Ed.) p. 1214. Although the conductor may have been violating a rule of the company to carry the decedent without fare, still that fact could not deprive him of the character of passenger, or relieve the company of the duty imposed upon it as to passengers. In this case it was not proven, nor did it offer to prove, that the decedent tried to practice a fraud upon it to obtain

Passengers—  
Riding Free by  
Permission of  
Conductor—  
Master and  
Servant.

Louisville & N. R. Co. v. Scott's Adm'r

passage on the train. The conductor was in charge of the train, and by his courtesy and permission the decedent was carried, and was entitled to receive the care which the law imposes on a carrier of passengers. *Thomp. Carr. Pass.* p. 44, says: "The simple fact that an agent of the carrier violates his duty, and invites a person to ride free, without collusion on his part with the agent to defraud the carrier, will not operate so as to deprive him of his remedy as a passenger, if he is injured through carelessness of the carrier's agents." 2 *Wood, R. R.* p 1207, says: "But where a person rides free at the invitation of an agent of the carrier, although the agent has violated his duty by inviting him, yet, if there is no collusion on his part with the agent to defraud the company, he is not deprived of his rights or remedies as a passenger as to injuries received through the negligence of the company." In *Hutch. Carr.* § 565, it is said: "It is universally agreed that the payment of the fare or the price of the carriage is not necessary to give rise to the liability. The carrier may demand its prepayment, if he chooses to do so; but, if he permits the passenger to take his seat, or to enter his vehicle as a passenger, without such requirement, the obligation to pay will stand for the actual payment, for the purpose of giving effect to the contract, with all its obligations and duties." The adjudged cases of many of the courts of last resort of the country support *Wood* and *Hutchinson* on the proposition stated by them. In *Wilson v. Railroad Co.*, 107 *Mass.* 110, the driver of a horse car invited a person to get on the car, and while thus traveling he was injured. The court said: "A master is bound by the acts of his servant in the course of his employment. They are deemed to be the acts of the master. *Ramsden v. Railroad Co.*, 104 *Mass.* 117, and cases cited. The driver of a horse car is an agent of the corporation, having charge, in part, of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties, but is an act within the general scope of his agency,

*Louisville & N. R. Co. v. Scott's Adm'r*

for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and, if she accepted it innocently, she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions."

It is argued by counsel for appellant that, as the decedent was its employee, he did not sustain the relation of passenger, and that, being an employee, and riding upon the train, he took the risks attending the operation of the train. To perform the duties imposed upon his sister as station agent, it was not necessary for him to ride upon this train. His labors on the day of the accident had ceased five hours before it took place. The mere fact that the injury took place between Rowland and Stanford, he being on his homeward journey, did not create the relationship of master and employee. He was not an employee on this train at any time. His services were distinct from that of operating the train. Some courts have held that, where an employee in another department of the service is permitted to ride on the train of his employer from his home to the place of his employment, or on his return from his employment to his home, the status of passenger does not exist, but he is regarded as being an employee taking such risks as employees in charge of the train would take. There is a sharp conflict in the opinions of the court on this question. If it be a correct rule, the facts of this case do not bring it within the rule. 2 Wood, R. R. p. 1217, criticises the correctness of the proposition, saying: "But, as to the last proposition, it does not seem to us that it has any foundation in principle as to employees who have not commenced their work for the day, or who are returning after the services of the day are completed. How the mere circumstance that a person is in the employ of the company in a department entirely distinct from the operation of the train, who is permitted to ride free upon the train to and from his work, can deprive him of the status of a passenger, is not readily seen. While going to and from his work, the relation of servant does not exist. He is merely

## Notes

on his way to take up his position as servant, or is returning after his duty as a servant has ceased, and there is no reason why he should not be treated as a passenger, as well as any other person who is riding free upon the train." We are of the opinion that the decedent was a passenger on the train, and the same duty was imposed upon the company to carry him safely, as in the case of other passengers. This being true, he cannot be held to have assumed the risks attending the operation of the train in the manner and under the circumstances in which this train was operated,

Carriage of  
Passengers—Care  
Required.

the obligation being upon the company to use the utmost care and diligence to carry him safely. The duty was upon it to operate its train in such manner as would enable it to do this. If the manner of operating the train was not in the exercise of that high degree of care which a carrier of passengers is obligated by the law to exercise, it assumed the risk, and not the passenger, of traveling upon the train thus operated.

In defining the care that should have been exercised by the appellant, the court erred to the prejudice of the appellee. We do not think the court erred in admitting testimony tending to show that it was unsafe to operate the train with the coach in front, instead of the engine; nor did it err in admitting witnesses who were familiar with the operation of trains to testify that it was more hazardous to run a train in the manner in which this train was run than it would have been to have had the engine in front. The decedent was 32 years of age, a man of good habits, and good business ability, and we cannot say that the verdict of \$9,000 was excessive. The judgment is affirmed.

Death by Wrong-  
ful Act—Exces-  
sive Verdict.

## NOTES.

Who are Passengers—Permission of Employees to Travel on Train.—There are authorities holding that a person traveling on a train gratuitously by the consent of the conductor or brakeman is a passenger. See *St. Joseph & W. R. Co. v. Wheeler* (Kan.), 26 Am.

## Notes

& Eng. R. Cas. 173; *Pittsburg, etc., R. Co. v. Caldwell*, 74 Pa. St. 421; *Washburn v. Nashville, etc., R. Co.*, 3 Head (Tenn.) 638, 75 Am. Dec. 784; *Wilton v. Middlesex R. Co.*, 9 Am. Rep. 11, 125 Mass. 130; *Sherman v. Hannibal, etc., R. Co.*, 72 Mo. 62, 37 Am. Rep. 423, 4 Am. & Eng. R. Cas. 589; *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41.

**Permission of Employees to Travel on Train.**—Although, by the rules of a railroad company, conductors are prohibited from carrying passengers on construction or freight trains, yet, if a conductor is in the habit of carrying persons on such a train, and a person, in ignorance of the company's rules, obtains permission so to travel, he is lawfully upon the train and the company owes him the exercise of reasonable care and diligence. *St. Joseph & W. R. Co. v. Wheeler* (Kan.), 26 Am. & Eng. R. Cas. 173; *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41; and where a person was lawfully in a cab of a freight train paying for passage, as had frequently been done by other persons, it was held that he stood in the same relation as a passenger so far as concerned injuries wantonly and maliciously inflicted upon him by the conductor. *Western & A. R. Co. v. Turner* (Ga.), 28 Am. & Eng. R. Cas. 455. But if the liability of the company depends upon the question whether the train was one upon which it was customary to carry passengers, the fact that the conductor had permitted persons to travel upon it on two or three occasions and had collected fare, is not sufficient. The proof should show that the train carried passengers habitually or frequently. *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41. The fact that a freight train was not brought to the platform, or that the caboose was not convenient for passengers, or that the ticket office, to the knowledge of a person taking passage upon such train, was not open at or about the time of its departure, is not notice that the train was not one which was accustomed to carry passengers, when it appears that the ticket office was only opened for the sale of tickets at or about the time of the departure of regular passenger trains, and there was nothing in the external appearance of a caboose to indicate that it was not adapted for passenger traffic. *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41. Where a drover claimed that it was the custom for persons in charge of cattle to travel on an engine by the consent of the engineer, and the company claimed that it was contrary to orders for any person to ride on an engine, the question whether the company had, notwithstanding its rules, by its conduct held out its employees as authorized to consent to drovers being upon the engine, is for the jury. *Waterbury v. New York C. & H. R. R. Co.*, 17 Fed. Rep. 671. See, also, *Lake Shore & M. S. R. Co. v. Brown* (Ill.), 31 Am. & Eng. R. Cas. 61.

## Notes

When a person is riding in a place not adapted for passengers by the invitation of the person in charge of the car, he is not a trespasser, and the company is responsible to him for injuries sustained through its employees' negligence. *Wilton v. Middlesex R. Co.*, 107 Mass. 108, 125 Mass. 130; and if a person entitled to transportation is requested by those in charge of a switch engine to get upon the engine for the purpose of being conveyed to his destination, the employees in charge of the engine are bound to exercise such care for his safety as is required in the case of a passenger, and the question whether he was a passenger, is one of fact for the jury. *Lake Shore & M. S. R. Co. v. Brown* (Ill.), 31 Am. & Eng. R. Cas. 61.

Where a person has boarded a train without the knowledge of the conductor, he is to be regarded as a passenger, if the conductor after becoming aware of his presence, permits him to remain, although passengers are not allowed to be carried on the train, and he has paid, and intends to pay no fare. *Brennan v. Fair Haven & W. R. Co.*, 45 Conn. 284; *Muhlhausen v. St. Louis R. Co.* (Mo.), 28 Am. & Eng. R. Cas. 157; *Sherman v. Hannibal & St. J. R. Co.* (Mo.), 4 *Id.* 589; *Secord v. St. Paul, M. & M. R. Co.*, 18 Fed. Rep. 221.

But a person who travels voluntary on a train by the permission of the conductor given at his own request, and who pays no fare and selects an open flat car in which to travel rather than a passenger coach, cannot be deemed a passenger in the full, legal sense of the term. At most, he is only so *sub modo* and to a limited extent. *Higgins v. Cherokee R. Co.* (Ga.), 27 Am. & Eng. R. Cas. 218.

If an invitation to travel upon a conveyance on which the person invited would otherwise have no right, is given by a servant without authority to permit persons to ride on the car, and the invitation or permission is not in any sense in the interest of the carrier, or in the course of his employment, a person so traveling does not become a passenger. *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413. But where it is customary to carry passengers on construction trains, persons having no notice of a contrary rule have a right to assume that the conductor has authority to carry persons on such trains, and that the granting of permission by him falls within his general authority as the manager of the train. *St. Joseph & W. R. Co. v. Wheeler* (Kan.), 26 Am. & Eng. R. Cas. 173. If, however, the person invited to travel has knowledge of a rule forbidding passengers to ride upon the particular trains and he pays no fare, he cannot be deemed a passenger. *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98. So, too, where the train is of such a description that the conductor could not be presumed to have authority to permit passengers to ride upon it, an invitation by him to travel will not create the relation of carrier and passenger. *Eaton v. Delaware L. & W. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513.

Yazoo & M. V. R. Co. v. Millsaps

The engineer has no authority to give permission to any one to ride upon its engine against the rules of the company. *Chicago & A. R. Co. v. Michie*, 83 Ill. 427; *Robertson v. New York & E. R. Co.*, 22 Barb. (N. Y.) 91; and if the plaintiff in an action alleges that he was a passenger, and that the duty which the company owed him arose from the consent of the engineer to his riding upon the engine, the burden of proof is upon the plaintiff to establish that the engineer had authority to permit him so to travel, the presumption being that he had no right to be there whether he paid fare or not. *Robertson v. New York & E. R. Co.*, 22 Barb. (N. Y.) 91.

A fireman has no authority by virtue of his employment, to invite or permit a person to travel upon the tender, and such an invitation cannot create the relation of carrier and passenger. *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210.

A baggage master has no authority to permit persons to travel in the baggage car. *Reary v. Louisville, N. O. & T. R. Co. (La.)*, 34 Am. & Eng. R. Cas. 277.

The permission of the engine-driver to a person to ride upon the engine is not the permission of the company, he having no power to give such permission, and such person is not a passenger upon the train. *Chicago & A. R. Co. v. Michie*, 83 Ill. 427.

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YAZOO & M. V. R. Co.

v.

MILLSAPS *et al.*

(*Supreme Court of Mississippi, May 1, 1899.*)

Carriage of Freight—Negligent Delay—Damage by Fire—Proximate Cause.\*—Where goods are damaged while their shipment is negligently delayed by the carrier, by a fire for which it is not responsible, the carrier is not liable for such damage, as the fire is the proximate cause of the damage.

Same—Same—Same—Liability of Carrier.—Where goods are damaged under such circumstances, the carrier is only liable for their value in their damaged condition.

APPEAL by defendant from Claiborne county circuit court.  
*Reversed.*

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\*See note at end of case.



Yazoo &amp; M. V. R. Co. v. Millsaps

The following instruction was requested by defendant, and refused: "(1) The court instructs the jury for the defendant that in this case the railroad is not liable for any of the cotton actually destroyed by the fire, but only for the cash value of the seven bales damaged by the fire, in the condition in which it was after it was damaged; and if they believe from the evidence that the fair market value of the seven bales damaged, after they were damaged, was \$129.01, then their verdict will be for said sum of \$129.01, with interest at 6 per cent. per annum from 11th December, 1897, to the 21st May, 1898; or, if they believe from the evidence that the value of the seven damaged bales, after they were damaged, was more or less than \$129.01, then their verdict shall be for that sum, with 6 per cent. per annum from 11th December, 1897, to 21st May, 1898."

*Mayer & Harris*, for appellant.

*Martin & Anderson*, for appellees.

WHITFIELD, J. Going directly to the heart of the matter, the inquiry, on the answer to which this case must turn, is, was the fire, in this particular case, the intervening, independent, proximate cause of the loss, accidental and nonnegligent as to the appellant's employees? Grant, as we think is shown, that the delay in transportation was negligent, was there any causal connection between such delay as the proximate cause and the loss? Or was the loss due wholly to a fire purely accidental, as to which fire, in its origin and progress, the appellant was wholly free from blame,—the fire being the independent, intervening, proximate cause of the loss? As to this it is said in 1 Shear. & R. Neg. (5th Ed. 1898) § 40, under the head of "Superior Force Concurring with Defendant's Delay:" "In the application of this principle, a serious difference of opinion has arisen as to what is a natural sequence of negligence exposing the property of another to injury. In Pennsylvania, Massachusetts, Ohio, Iowa, Nebraska, and Arkansas, as well as in the United States

Carriage of  
Freight—Negli-  
gent Delay—Dam-  
age by Fire—  
Proximate Cause.

## Yazoo &amp; M. V. R. Co. v. Millsaps

supreme court, it is held that where a carrier, by negligent delay, exposes goods to injury by the act of God, or other cause for which he is not responsible, and which he could not naturally foresee, he is not liable for injuries arising from such a cause, although they would not have affected the goods if he had not negligently delayed their transportation. This decision is put upon the ground that he could not reasonably have anticipated such a result of his delay, and that, for aught he could possibly foresee, promptness might have exposed the goods to the risk quite as much as delay. In New York, New Hampshire, Missouri, and Tennessee, the very opposite doctrine is firmly settled,"—citing the authorities on both sides. We observe, curiously enough, the failure of the learned authors to cite, in support of the nonliability of the carrier in such case, the case of *Association v. Wood*, 64 Miss. 661, 2 South. 76, wherein is a masterly opinion by COOPER, C. J., on this subject. We note that the cases cited for nonliability by the learned authors are those cited and relied on by the counsel for the appellant and the court in 64 Miss. 661, 2 South. 76. So that, in this state, the question is settled against the liability of the carrier in such case. One of the cases relied on by learned counsel for appellees (*Thomas v. Lancaster Mills*, 19 C. C. A. 88, 71 Fed. 481) is a striking illustration of this very doctrine. See page 91, 19 C. C. A., and page 484, 71 Fed., where the court say, citing many authorities: "This delay [of 17 days] was not of itself a proximate cause of the destruction of the cotton by fire. \* \* \* The negligent delay was, standing alone, a remote, and not a proximate cause, remotely contributing to the injury as an occasion or condition." See note to *Morrison v. Davis*, 57 Am. Dec. 701. The appellant, so far as this record discloses, could not reasonably have anticipated loss from this fire originating half a mile from the depot platform. It may be that, on another trial, the appellees may be able to establish facts which would show that the appellant ought to have anticipated probable loss from such fire, and hence was negligent as to that. And whether it ought to have reason-

## Note

ably so anticipated such fire is, as held in 64 Miss. at page 678, 2 South. 81, a question of fact for the jury.

Same—Same—  
Same—Liability  
of Carrier.

But, unless the case of appellees is most materially strengthened on that point, we feel it our duty to say that the first instruction asked by the defendant, and refused, corrections as to dates touching interest being made, should be given as the full measure of appellees' rights. Reversed and remanded.

## NOTE.

**Carriage of Freight—Delay in Shipment—Liability—Proximate Cause.**—A railroad company which agrees with a compress company to transport to the compress all cotton received at a certain place is not liable to the owners or insurers of such cotton for the destruction by fire of a lot of cotton which had accumulated during the delay of the railroad company to furnish transportation, such delay not being the direct and proximate cause of the loss by fire. *St. Louis, I. M. & S. R. Co. v. Commercial U. Ins. Co.*, 49 Am. & Eng. R. Cas. 137, 139 U. S. 223, 11 Sup. Ct. Rep. 554.

Goods were left with a steamboat company for shipment, but no particular vessel was designated. While on the wharf they were burned, but without negligence on the part of the carrier. *Held*, that a delay in shipping was not the proximate cause of the loss, and would not make the company liable, even though there may have been negligence as to the delay. *Scott v. Baltimore, C. & R. Steamboat Co.*, 19 Fed. Rep. 56.

Defendant railroad company contracted with a compress company to furnish cars and carry cotton from a place of storage to the compress. Owing to a press of business cars were not furnished in sufficient numbers to move the cotton, and by reason of the delay a considerable quantity accumulated about the sheds and grounds of the compress company, which was consumed by fire. The fire extended to and consumed also plaintiff's warehouse. *Held*, that the failure of the railroad to furnish sufficient transportation for the cotton was not the direct and proximate cause of the fire, and did not render the company liable. *Martin v. St. Louis, I. M. & S. R. Co.*, 56 Am. & Eng. R. Cas. 112, 55 Ark. 510, 19 S. W. Rep. 314.

Where the proximate cause of damage to goods was exposure to the elements and not the violation of a contract, an action cannot be maintained against a railroad company for delay in forwarding the freight, where such delay was alleged to be the cause of the action.

## Missouri, K. &amp; T. Ry. Co. v. Truskett

ble injury. St. Louis, A. & T. R. Co. v. Neel, 55 Am. & Eng. R. Cas. 428, 56 Ark. 279, 19 S. W. Rep. 963.

In an action for the destruction by fire of cotton placed alongside a railway track awaiting shipment, the court instructed the jury that, if the shipper contracted with defendant to furnish a car for the shipment of such cotton, and the company failed to comply with such contract, and by reason of such failure the cotton was damaged by fire, the verdict should be for the plaintiff. *Held* error, there being no evidence connecting the supposed breach of contract to supply the car with the fire from which the damage resulted. Kansas City, M. & B. R. Co. v. Lilly (Miss.), 45 Am. & Eng. R. Cas. 379, 8 So. Rep. 644. See also Mr. Howe's able article on "proximate cause," 1 Am. & Eng. R. Cas., N. S., p. xix *et seq.*

But see Louisville & N. R. Co. v. Gidley (Ala.), 13 Am. & Eng. R. Cas., N. S., 214, where it appeared that the bill of lading under which leather was delivered to the defendant railroad for shipment north guaranteed "through rates," and the shipper gave no directions as to the route of shipment. The leather was received by the carrier on Saturday, too late to be shipped over the usual route, but could have been sent north over the carrier's short line and a connecting road, on the afternoon of that day, but was stored by the carrier for shipment on the next train over the usual route, which would not leave until Monday morning. The leather was burned on Saturday night. *Held*, that the carrier's failure to ship the leather on Saturday rendered it liable for the loss. And see *foot-notes* 13 Am. & Eng. R. Cas., N. S., 214.

## MISSOURI, K. &amp; T. RY CO.

v.

## TRUSKETT.

(Court of Appeals of Indian Territory, Oct. 26, 1899.)

**Pleading—Error Superinduced by Adversary.**—Defendant could not complain on account of being held liable on its contracts merely because of the refusal to strike out plaintiff's inartificial pleading, the defect being superinduced by the mistake of defendant's agent in not furnishing plaintiff correct copies of the contracts at the commencement of the suit, and the pleading being fully answered.

**Harmless Error.**—The error of allowing the introduction of testi-

## Missouri, K. &amp; T. Ry. Co. v. Truskett

mony of verbal arrangements contradicting such written contracts was cured by the court's withdrawal of such testimony from the consideration of the jury.

**Carriage of Live Stock—Delay—Evidence—Market Reports.**—In an action for damage to cattle caused by the carrier's negligence in delaying them in transit, the market reports as to their value on the days on which they might have been delivered, but for such delay, at their contract destination or at the point where they were finally delivered, were admissible under proper instructions.

**Same—Same—Act of God.**—A heavy dew cannot be a sufficient cause for delay in transporting cattle by railroad, so as to relieve the railroad company from liability for delay.

**Same—Same—Elements of Damage.\***—Extra expense in feeding live stock, incurred by reason of delay in transit, is a proper element of damages in an action for such delay.

**Same—Same—Damages—Interest.**—In such an action, interest should be allowed on the damages found.

**APPEAL** by defendant from the United States court for the Northern district of the Indian Territory. *Affirmed.*

On the 26th of September, 1892, complaint was filed in this case by plaintiff below (appellee here) against the defendant below (the appellant here), alleging that in July, 1892, plaintiff delivered to defendant 180 head of cattle to be transported by defendant to Paola, Kan., and from there to be forwarded to Chicago, Ill., via Kansas City, Mo.; that said cattle were received by defendant at Stevens, Ind. T., in a good, healthy, and merchantable condition; that said contract of shipment was in writing, and attached to complaint as Exhibit A,—and further alleges: “\* \* \* That said defendant, through its agents, servants, and employees, after receiving said cattle and fastening them in its said cars, became grossly negligent, and failed, neglected, and refused to transport said cattle in accordance with said agreement, and, on account of insufficient and defective means and methods of transportation, failed to get said cattle to Paola, Kansas, until twenty-four hours later than the usual and ordinary time. That said

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\*See *Swift River Co. v. Fitchburg R. Co.* (Mass.), 8 Am. & Eng. R. Cas., N. S., 512, and *note*, 514.

Missouri, K. & T. Ry. Co. v. Truskett

cattle were delayed by defendant's negligence as aforesaid in reaching their destination at Chicago, Ill., for twenty-four hours, and, when they did reach their said destination, were greatly damaged and injured, and caused plaintiff a large amount of extra time and expense in marketing the same. Paragraph 1. Whereby, on account of extra expense in feed and delay as aforesaid, and on account of the shrinkage in weight, and the tired, exhausted, and injured condition of said cattle when they did arrive at their destination as aforesaid, plaintiff was greatly damaged, to wit, in the sum of two hundred (\$200) dollars. Paragraph 2. That on account of the carelessness, negligence, and breach of contract, as aforesaid, on defendant's part, plaintiff suffered further and greater loss on account of the depreciation in the market value of said cattle, for the reason that the cattle market was about \$1.25 per hundredweight lower on the said day when defendants actually delivered said cattle in Chicago, Illinois, than it was on the day previous, when they should have been delivered according to contract. That the total weight of said 180 head of said cattle was 184,350 lbs., or thereabouts. And plaintiff avers the fact to be that said cattle, on the said day that the defendant delivered them in Chicago as aforesaid, and on account of the depreciated market, were worth at least twenty-three hundred (\$2,300) dollars less than they would have been on the day previous, when defendant contracted and agreed to deliver them." On June 9, 1893, plaintiff, by leave of court, filed an amended complaint, and alleged: That during the year 1892 defendant was a common carrier of live stock for hire. That plaintiff on July 4, 1892, delivered 180 head of cattle to be delivered at Chicago, Ill., within a reasonable time, and made a verbal contract with defendant to that effect previous to the delivery of said cattle to defendant. That said cattle were loaded at Stevens, Ind. T., and were in a sound, healthy, and merchantable condition. That no contract in writing was made until after the cattle were received, loaded in the cars, and transported about 10 miles from Stevens, and through and beyond

Missouri, K. &amp; T. Ry. Co. v. Truskett

Coffeyville, Kan., its next station. That then defendant presented to plaintiff two written contracts, attached as Exhibits A and B to this amended complaint, to sign. Plaintiff had no opportunity to read or examine said written contracts, and signed them under protest. That after the cattle were delivered at Chicago, and plaintiff returned home, he requested defendant's agent at Coffeyville, Kan., to give him said pretended written contracts, or copies thereof, and said agent gave him a pretended copy, which plaintiff attached to his original complaint, marked "Exhibit A." Plaintiff afterwards learned that said pretended copy was not a copy at all. Plaintiff's attorney made demand for true copies, and was furnished one by defendant's attorney, but defendant failed and refused to furnish the other. That said cattle were shipped in seven cars, according to the aforesaid verbal contract, and plaintiff signed the written contracts under duress. Plaintiff asks that said written contracts be adjudged null and void. That said defendant, after receiving said cattle, "\* \* \*" became grossly negligent and careless, and failed, neglected, and refused to feed, water, handle, and transport said cattle in accordance with said agreement, and on account of insufficient and defective means and methods of transportation, and on account of defective, imperfect, and impracticable locomotive engines, and on account of defective railway cars, tracks, and roadbed, failed for about 20 hours to get said cattle further than a short distance beyond the said station of Coffeyville, Kansas, where they were held on board and fastened in defendant's cars for about twenty (20) hours without food or water, and that said cattle, on account of said defendant's neglect as aforesaid, did not reach Paola, Kansas, and the said Kansas City, Missouri, on their way to said city of Chicago, until about twenty-four hours later than the usual, regular, and ordinary running time on said defendant's line of railway and other connecting lines. That said cattle did not reach the said city of Chicago, Illinois, until twenty-four hours later than the usual, ordinary, and regular time when they should have

Missouri, K. & T. Ry. Co. v. Truskett

reached there. That said delay was caused entirely by said defendant's negligence and carelessness as aforesaid, and when said plaintiff's cattle did reach their said destination at Chicago, Illinois, they were greatly damaged and injured, and caused plaintiff a large amount of extra time and expense in marketing the same, and a great loss by way of shrinkage in weight, etc. Whereby, on account of said extra expense in feeding and delay, loss of time, and shrinkage in weight of said cattle, and their tired, exhausted, and injured condition when they did so arrive at their said destination as aforesaid, plaintiff was greatly damaged, to wit, in the sum of five hundred (\$500) dollars, for which amount plaintiff prays judgment against said defendant. For a second and further paragraph in this, said plaintiff's complaint, plaintiff makes the above and foregoing first paragraph hereof a part of this his second paragraph, and says that on account of the carelessness, negligence, and breach of contract as aforesaid on the part of said defendant, its said agents, servants, and employees, plaintiff suffered further and greater loss and damage to his said stock on account of the depreciation of the market value of said cattle, for the reason that the cattle market was about \$1.25 per hundred-weight lower on the said day when defendant actually delivered said cattle in Chicago, Illinois, than it was on the day previous, when they should have been delivered according to said contract; that the total weight of said one hundred and eighty (180) head of cattle was 184,350 lbs., or thereabouts, and said plaintiff avers the fact to be that said cattle on the said date that defendant delivered them in Chicago as aforesaid, and on account of the depreciated market, were worth at least \$2,300 less than they would have been on the day previous, when defendant contracted and agreed to deliver them; that said delay in the delivery of said cattle by said defendant, its agents, servants, and employees, was caused solely on its said line of railway between said station of Stevens, Indian Territory, and its station named 'Parsons,' in said state of Kansas; that this



## Missouri. K. &amp; T. Ry. Co. v. Truskett

plaintiff in no way contributed to said delay, but, on the contrary, was in actual attendance on his said stock during their transit from said Stevens station, Indian Territory, to said Chicago, Illinois, and did everything that he could to prevent said delay, and cause said cattle to be delivered at their destination in time as they should have been delivered." On August 11, 1896, defendant filed its answer to the amended complaint, and denied specifically and in detail each and every allegation in plaintiff's amended complaint, and alleged "that on the 4th day of July, 1892, it did enter into a written contract with H. A. Truskett for the transportation of three car loads of cattle from Coffeyville, Kansas, to Paola, Kansas, which were consigned to White & Rial, of Kansas City, Missouri, which said contract is attached hereto, and marked 'Exhibit A,' and also a written contract for the transportation of four car loads of cattle from Coffeyville, Kansas, to Paola, Kansas, which were consigned to the George R. Barse Live-Stock Commission Company, a copy of which contract is attached hereto, and marked 'Exhibit B.' Defendant further states that it performed the said contracts fully, and that plaintiff was not damaged in any way by failure of defendant to transport said cattle as it agreed to do. Defendant, for further answer, states that plaintiff did not give notice in writing of any claim for damage because of any failure of defendant in any way to comply with said contracts, to any general officer of the defendant, or to the agent nearest to the aforesaid delivering station, within thirty days after said loss or damage had been claimed to have been sustained, though defendant had such general officer and such agent to whom plaintiff could have given notice." On September 21, 1896, defendant "files motion for leave to withdraw from the files the answer to the amended complaint herein, which motion is allowed, whereupon the defendant files motion to strike out the complaint, which motion is by the court overruled, and the defendant then filed answer to amended complaint." On September 22, 1896, case was tried to a jury, who returned

Missouri, K. & T. Ry. Co. v. Truskett

a verdict for plaintiff. Defendant filed motion for new trial, which was overruled by the court, and judgment entered on the verdict, and defendant appealed to this court.

*Clifford L. Jackson*, for appellant.

*S. M. Porter*, for appellee.

TOWNSEND, J. (after stating the facts). The appellant has filed 43 specifications of error, which it has discussed under eight special assignments. They are as follows, to wit: "(1) The district court should not have permitted appellee to have introduced any evidence under the amended complaint, but should have struck out this complaint on appellant's motion, and should not have held that appellee complied with terms of written contracts, and should have directed a verdict for appellant. (2) The appellee should not have been permitted to introduce testimony of the verbal arrangements which contradict the written contracts which the court held binding in this case. (3) The appellee should not have been permitted to introduce testimony as to the market value of the cattle in question in Chicago, and the court should have instructed the jury that they could not consider any evidence as to the market value of the cattle in Chicago in this case, but must confine their consideration to the evidence as to the market value of the cattle in question in Kansas City. (4) Neither the appellee nor his brother should have been permitted to testify as to the market value of the cattle in question in Kansas City and in Chicago. (5) The accounts sales in this case were not competent evidence and should not have been admitted. (6) The court should have instructed the jury that if there was any delay in the transportation of the cattle in question by the appellant, and said delay was occasioned by the act of God, and not by the fault of the appellant, the appellee could not recover any damages on account of said delay from the appellant; and the court should not have instructed the jury as it did on the question of the delay on the appellant's line of railway. (7) The appellee should not have been per-

## Missouri, K. &amp; T. Ry. Co. v. Truskett

mitted to offer proof as to the extra feed required for the cattle in question, and was not entitled to recover any damages in this case on account of the expense incurred in feeding the cattle in controversy. (8) The jury were wrongfully instructed upon the question of the right of the appellee to recover interest on damages in this case."

As to the first assignment of error, we would say that the appellee in his original complaint set up that the contract of shipment was in writing, but, having subsequently ascertained that the copy furnished him by the agent of appellant was not correct, it became necessary to amend his complaint. In doing so, he states that he was required to sign two contracts in writing, one covering four cars of his cattle, and the other three cars, and that these contracts were signed after the train was some miles on its journey; and, while he attaches the two copies to his amended complaint, he asks that they be declared void, and that the appellant be held to its liability as a carrier, independant of the written contracts. The trial court, upon its coming to his knowledge during the trial that appellant had not only signed the written contracts at the time of shipment, but subsequently, and on his return from the shipment, signed the following: "We, the undersigned persons in charge of the live stock mentioned in the within contract, in consideration of the free pass granted us by the Missouri, Kansas & Texas Railway Co., and of the other covenants and agreements contained in said contract, including the rules and regulations printed on the back thereof, all of which, for the consideration aforesaid, are hereby accepted by us, and made a part of this, our contract, and all the terms and conditions of which we hereby agree to observe and be severally bound by, do hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, we shall be deemed employees of said Mo., Kan. & Tex. Railway Co., for the purposes of said contract stated, and that we do agree to assume, and do hereby assume, all risks incident to such employment, and that said railway company shall in no case be liable to us for

## Missouri, K. &amp; T. Ry. Co. v. Truskett

any injury or damage sustained by us during such time for which it would not be liable to its regular employees. H. A. Truskett. D.,"—held that appellee was bound by the written contracts, and appellant cannot complain of being held liable under its own contracts simply by reason of inartificial pleading by the appellee, to which appellant had fully answered, superinduced by the mistake made by its own agent in not furnishing appellee correct copies of the contracts at the commencement of the suit.

Pleading—Error  
Superinduced by  
Adversary.

As to the second assignment of error, we say that, while some evidence had been introduced of verbal arrangements, the same was withdrawn by the court from the jury, as follows: "The plaintiff rests his case here, and in your absence the defendant submitted a motion which the court has allowed. That motion is to the effect that the court should withdraw from the jury all testimony submitted with reference to the verbal contract between the plaintiff and defendant in this case. The court has sustained that motion, and is of the opinion that whatever talk was had between the plaintiff and the agents of the railroad company was merged in a written contract, and its terms are not to govern the liability of the company in this case. The jury will consider the written contract and its terms as governing between the plaintiff and defendant in this case."

Harmless Error.

As to the third assignment of error, it was in evidence that the appellee notified the agent of appellant at the time of the delivery of the cattle for shipment that they were to be shipped via Kansas City to Chicago, Ill. The contract for the shipment specified Kansas City, Mo., as the destination of the shipment. The trial court upon that question instructed the jury as follows: "The court instructs the jury that, if they should find in this case that the plaintiff is entitled to recover from the defendant, in arriving at the amount of such damages they must not consider any evidence as to the market value of the cattle at Chicago, Ill., unless they should find from the

Carriage of Live  
Stock—Delay—  
Evidence—Mar-  
ket Reports.

Louisville &amp; N. R. Co. v. Farmers', etc., Firm

injury and damage, to be determined by you from the evidence in this case. \* \* \* If, by reason of the defendant's negligence in the management and handling of the plaintiff's cattle on its railway line, they became unusually bruised and injured, and their market value reduced, then the defendant would be liable to the plaintiff for the fair and reasonable amount of such injury and depreciation, to be ascertained by the evidence in this case." Hence, practically, the court limited the recovery to the damages arising in the transportation from Coffeyville to Parsons on appellant's own line; and unless appellant can show prejudicial error was committed by the court, which must have necessarily changed the verdict of the jury from what it ought to have been, the appellant cannot be heard to complain here, and ask for a reversal of the result reached there. We are of the opinion that no intelligent jury could have misapprehended the court's instructions, and that the verdict of the jury was right, and the judgment of the court upon the same was correct, and it is therefore affirmed. Affirmed.

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LOUISVILLE & N. R. Co.

v.

FARMERS' & DROVERS' LIVE-STOCK COMMISSION FIRM.

(*Court of Appeals of Kentucky, Oct. 11, 1899.*)

**Carriage of Live Stock—Delay—Liability of Initial Carrier.\***—When the initial carrier receives live stock and contracts to transport them over its own and connecting lines to a point beyond its own line, it must, at its peril, know that the connecting lines will be prepared to continue the transportation at the point of connection without undue delay.

**Same—Liability of Initial Carrier—Invalid Stipulation.**—Where the initial carrier contracts to transport live stock over its own and con-

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\*See note at end of case.

Louisville & N. R. Co. v. Farmers', etc., Firm

necting lines to a point beyond its own line, it cannot escape the responsibility imposed upon it by law as a common carrier by stipulating that its liability for the stock shall cease when it is "ready to be delivered" to a connecting line.

Same — Negligence — Question for Jury.—The question as to whether or not the loss sustained by plaintiff resulted from the negligence of the initial carrier was a question for the jury.

Harmless Error.—Harmless error is not reversible error.

APPEAL by defendant from Jefferson county common pleas division circuit court. *Affirmed.*

*Lyttleton Cooke and Edward W. Hines*, for appellant.

*M. A., D. A. & J. G. Sachs*, for appellee.

BURNAM, J. Appellee sought in this action to recover damages from appellant and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for injury resulting from unnecessary delay on their part in transporting four car loads of hogs, alleged to have been delivered to appellant on the 26th and 27th days of October, 1892, for shipment from Louisville, Ky., to Jersey City, N. J., over its own and connecting lines. The Louisville & Nashville Railroad Company admits the receipt by it of the four car loads of hogs at the time indicated, which, it says, were, by its contract of shipment, to be transported by it from Louisville, Ky., to Covington, Ky., and were there to be delivered to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, to be thence forwarded by said line to the terminus thereof, and there to be delivered to the next connecting line which might constitute a part of the route to Jersey City, N. J.; and says that, in accordance with its agreement, as set forth in the contract of shipment, it promptly transported the hogs from Louisville to Covington, and delivered them in as good order as when received to the Covington Stock-Yards Company, who was the agent of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and duly authorized by them to accept said delivery; that the stock-yards company promptly notified the Cleveland, Cincinnati, Chicago & St. Louis Railway

Case Stated.

Louisville & N. R. Co. v. Farmers', etc., Firm

Company of the receipt of the hogs, and demand made that they should furnish cars for their continued transportation; that the delay in the shipment was occasioned wholly by the failure of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to furnish cars; and alleges that appellee was promptly notified of such failure, and requested to give instructions as to what should be done with the hogs. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, in its answer, denies that it is the connecting road with the Louisville & Nashville Railroad for transportation from Covington to points east of Cincinnati any more than divers other roads, or that it ever agreed in any way to receive the hogs, or did in any way receive them, and says that when these hogs were offered to it for transportation by the stock-yards people it declined to receive them, because it did not have sufficient cars and rolling stock at that time to transport them, and denies that it at any time came under any obligations to appellee in any way. Appellee, by way of reply, denies that the hogs were ever delivered by appellant to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and charges it with gross negligence in failing to promptly inform it of the failure of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to furnish cars, and in failing to forward them by some other route. The trial resulted in a verdict and judgment against appellant for the amount sued for.

The facts in the case are that on the 26th day of October, 1892, appellant received about 300 head of hogs, which were loaded in two of their double-deck cars for transportation from Louisville, Ky., to Jersey City, N. J., over its own and connecting lines; that these cars left Louisville on the afternoon of the 26th, and arrived in Covington early on the morning of the 27th; that on the 27th day of October it received another consignment of 290 hogs under a similar agreement, which reached Covington early on the morning of the 28th; that when the cars containing these hogs reached Covington they were turned over to one W. A. Peter, pro-

Louisville & N. R. Co. v. Farmers', etc., Firm

prietor of the Covington Stock Yards, with directions that he should unload them from the cars in which they had been transported from Louisville, and that he should procure other cars for their further transportation from the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and see that they were properly loaded and forwarded to their destination. The president of the stock yards testifies that as soon as the first shipment arrived on the morning of the 27th of October he notified the Cleveland, Cincinnati, Chicago & St. Louis Railway Company thereof, and requested it to furnish cars for their continued transportation, which it declined to do, assigning as a reason that it was short of cars; that he continued to make such requests three or four times a day, until the 29th, before notifying appellant of its failure to furnish the cars, but that on the 29th of October he telegraphed the agent of appellant in Louisville for instructions with regard to the further disposition of the hogs. Thereupon appellant for the first time communicated to appellee the fact that the hogs had been held up in Covington. Appellee thereupon requested appellant to have the hogs forwarded at once over any route from which transportation could be had, and they left Covington for their destination late in the afternoon of October 31st. In the ordinary course of business they should have been forwarded on the evening of the days in which they arrived at the stock pens. The testimony shows that these hogs reached their destination five days after they were due, and that they were, to some extent, damaged by shrinkage from the length of time in which they were en route.

It is the contention of appellant that the contract of shipment in this case did not require actual delivery of the hogs to its connecting lines at Covington; that under the wording of the contract its liability was to cease when the goods were "ready to be delivered" to its connecting line. The stock-yards company was not the agent of either appellant or the Cleveland, Cincinnati, Chicago & St. Louis Railway Company in the sense that they are responsible for any negligence



Louisville & N. R. Co. v. Farmers', etc., Firm

on its part. As a matter of convenience, and by common consent of all the railroads centering in Covington, it was customary, when live stock had to be changed from one route to another, or from one car to another, for all the railroads to deliver it to the stock-yards company for this purpose, who usually, in addition to unloading the stock, fed and watered it, and assumed the responsibility of notifying the next connecting carrier to furnish the neces-

Carriage of Live  
Stock—Delay—  
Liability of Initial  
Carrier.

sary cars, and, when so furnished, to reload same therein. It was obligatory upon appellant, when it received the hogs, and contracted to transport them over its own and connecting lines to a point beyond its own line, to have known that the connecting lines were prepared to continue the transportation at the point of connection without undue delay. This was information easily within their reach in the ordinary course of business, and which it would have been more difficult for the shipper to have ascertained; and appellee had a right, under the contract of shipment, to expect of appellant the proper discharge of this duty; and if, from any unusual and unexpected cause, the connecting carrier could not furnish facilities for continued transportation, it was the duty of appellant either to have promptly forwarded the hogs by some other route, or to have notified appellee of the facts, and for failure is liable to the shipper for any injury which results from unreasonable delay. See Hutch. Carr. § 292, and cases there cited. The delivery of the hogs by appellant to the stock-yards company was not a delivery of them to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, so far as the rights of appellee were affected. Appellee did not authorize their delivery to the stock-yards company, and, so far as it was concerned, the actual custody remained with appellant. See Hutch. Carr. § 104, and Conkey v. Railway Co., 31 Wis. 619. Appellant assumed to transport these hogs, by its own and connecting lines, from Louisville to Jersey City, and it cannot escape the responsibility imposed upon it by law as a common carrier and forwarder

Same—Liability  
of Initial Carrier  
—Invalid Stipulation.

Note

of goods by stipulating that its liability for live stock intrusted to its care shall cease when it is ready to be delivered to a connecting carrier. The universal rule is that there must be actual or constructive delivery to such connecting carrier, so far as the shipper is concerned, before the initial carrier can relieve itself from responsibility under its contract.

The question as to whether or not the loss sustained in this case resulted from the negligence of appellant, either in its failure to see the actual delivery of the hogs to its connecting line, to be forwarded by them to destination, or in not promptly notifying appellee of such failure on their part, was, properly a question for the jury, and we think the instructions given on this point fully and correctly state the law.

Same—Negligence—Question for Jury.

It is the contention of appellant that the instruction upon the measure of damage is not correct, and, while it may be that this contention is technically right, yet the proof in the case is uncontradicted that the amount of the recovery was the actual loss sustained by appellee. This loss consisted not only in the depreciation in price and shrinkage in weight, but also the added charges for transportation and disposition of the hogs after they arrived at their destination. For reasons indicated, the judgment is affirmed.

Harmless Error.

NOTE.

Connecting Lines—Contract for Through Shipment—Liability of Initial Carrier.—Where a carrier undertakes to transport cattle to a point beyond its own line, it is liable for a delay at the end of its line caused by the train on the connecting line having departed before the one carrying the cattle arrived. *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268.

When a company contracts to ship stock to a given point, it is bound to forward and deliver it at that point within a reasonable time. It will not be released by a delivery to a connecting road, but will still be liable for any unreasonable delay, although the same is

*Burns v. Chicago, etc., Ry. Co*

caused by the crowded condition of such road. In order to guard against delay on connecting road the company should so provide in the contract, or contract only to transport over its own road and deliver to the next succeeding line to the place of destination. *Toledo, W. & W. R. Co. v. Lockhart*, 71 Ill. 627.

Where a railroad company contracts to convey goods over its own and connecting lines, and to deliver them at their destination at a place beyond its terminus, within a certain time, it is liable to the shipper for losses caused by delays in transportation over the connecting roads. *Pereira v. Central Pac. R. Co.*, 18 Am. & Eng. R. Cas. 565, 66 Cal. 92, 4 Pac. Rep. 988.

Where goods are to be carried to a certain destination, which will require them to pass over several connecting roads, and where a through contract is made by the first carrier, and the amount of freight received is for a through carriage, the first carrier will not be relieved from liability for loss or injury because some of the goods are shipped at the beginning of the second carrier's line. *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. (U. S.) 123, 11 Am. Ry. Rep. 431.

Where goods are shipped with a certain company for transportation, and the goods pass through other companies merely as agents of the first, and are lost, suit should be brought against the first company alone, and it is error to take judgment against all the companies. *Anchor Line v. Dater*, 68 Ill. 369.

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BURNS

*v.*

## CHICAGO, M. &amp; ST. P. RY. CO.

*(Supreme Court of Wisconsin, Nov. 24, 1899.)*

**Carriage of Live Stock—Delays—Time-Tables as Notice.**—A shipper of live stock must, at his peril, take notice of delays indicated upon the scheduled time-tables of the carrier.

**Same—Same—Negligence—Sufficiency of Evidence.**—In the transportation of plaintiff's live stock, there was no negligence shown on the part of defendant in the various delays in transit.

Burns v. Chicago, etc., Ry. Co

**Same—Caring for Stock in Transit—Special Contracts.\***—Where a shipper of live stock assumes, by special contract, the duty of feeding and watering, the only duty of the carrier, in this connection, is that of furnishing the shipper reasonable opportunities for caring for the stock.

**Same — Same — Requesting Opportunities.**—Defendant's agent being chargeable with notice that plaintiff's horses had been on the cars without water more than 33 hours, a statement to such agent by plaintiff, at 2:30 p. m. to the effect that the horses ought to go somewhere to be fed and watered, and that if they did not get to their destination before dark (which did not seem probable) they could not be fed or watered that night, was equivalent to a request that the cars be placed where such feeding and watering could be done.

**Same—Same—Interstate Shipments—Action for Negligence Based on Penal Statute.**—A federal statute provides, in substance, that no railroad company carrying live stock shall confine the same in cars for a longer period than 28 consecutive hours without unloading the same for rest, water, and feeding for a period of five consecutive hours, etc. *Held*, that an action for negligence may be based upon the non-performance of this statutory duty, although the statute prescribes a penalty for its violation.

**Contributory Negligence—Question for Jury.**—Whether plaintiff was guilty of contributory negligence, in failing to attempt to unload and care for his horses at a certain point and in failing to unload them at night after they reached their destination, was a question for the jury.

**APPEAL** by defendant from Oconto county circuit court.  
*Reversed.*

This is an action for damages caused by alleged negligent delays in the carriage of two carloads of horses over the defendant's road, and by neglect to feed and water said horses while in transit. The facts were not greatly in dispute. It appears that on the 7th of January, 1896, the plaintiff shipped 16 horses in two freight cars on the defendant's road at Oconto to Boyd's log track, in the state of Michigan, a distance of about 130 miles. This log track is a spur about three miles in length, owned

Case Stated.

\**Burgher v. Chicago, etc., R. Co.* (Iowa), 11 Am. & Eng. R. Cas., N. S., 130, and *note*, 137. See also *Grieve v. Illinois Cent. R. Co.*, 9 Am. & Eng. R. Cas., N. S., (Iowa.) 669, and *note*, 674.

*Burns v. Chicago, etc., Ry. Co*

by the Bergland Lumber Company, and used by that company and other lumbering concerns by their permission for getting logs out of the woods. It extended from the Channing Branch of the defendant's road in Northern Michigan, and branches off from the defendant's track at a point in the woods about seven miles north of a station call "Sidnaw." The understanding at the time of the shipment was that the cars were to be placed at a point near the end of this private track. The horses were fed and watered at about 1 o'clock in the morning of January 7th, were then loaded upon the cars, and left Oconto at 5 o'clock a. m.; the horses in each car being in charge of an employee of the plaintiff. They were shipped under a written contract, which provided that there should be no liability for delay unless caused by gross negligence, and also that the owner or party in charge should bear the expenses of feeding and watering the same during transportation. The contract also provided that the plaintiff's employees in charge of the stock should be transported without charge on the same train. There was a logging outfit, besides a considerable amount of hay and other feed, shipped in the cars with the horses. At 5:30 o'clock a. m. the cars reached Oconto Junction, where they remained until 8 o'clock, waiting for the regular train going north on the main line. This train took them to Iron Mountain, Mich., where they were cut out and left, because the train went through on the main line to Champion, and made no connection with the train on the Ontonagon Branch, where these cars were going. They remained at Iron Mountain from 1 o'clock p. m. until about 8 o'clock p. m., when they were put into a train, and taken to Channing, which point was reached about 11 o'clock p. m. of the same day. They remained at Channing until 3 o'clock on the morning of the 8th, and were then taken upon the first train upon the Ontonagon Branch, and left at Sidnaw at about 7 o'clock a. m. Here they were cut out of the train, and remained upon the side track until about 4:30 o'clock p. m., when a switch engine stationed at Sidnaw took them to Boyd's log track, and, after

## Burns v. Chicago, etc., Ry. Co

taking out the loaded cars from the track, placed the cars in question near the end of the track at about 7 o'clock in the evening. The horses had no food or water during the entire trip. There were appliances for this purpose at Iron Mountain, but the plaintiff's employees in charge of the stock testify that they did not need food or water while there. There was also a movable chute for the unloading of horses at Sidnaw, and water could be easily obtained there, but the plaintiff's employees say that they did not see any platform or chute there, and it appears that the cars were not placed where the horses could be taken out. They did not ask that the cars be placed at any chute or platform, or that they should be fed or watered; and gives as a reason for this that the agent at Sidnaw told them on their arrival that the cars would be taken to the logging track at 8 or 9 o'clock a. m., and that, not being taken at that time, they went to the agent again at 11 o'clock, and he told them they would be taken right after dinner, and that between 2 and 3 o'clock p. m. the agent finally told them they would not be taken until after the passenger train went south. The plaintiff himself arrived at Sidnaw by passenger train at 11 o'clock a. m. of the 8th, while the horses were still there, but he made no effort to feed or water the horses, nor did he directly demand of any of the defendant's employees that the horses be placed at a chute at Sidnaw, but he testifies that he told the agent at about 2:30 o'clock p. m. that the horses ought to go somewhere where they could be fed and watered, and that, if they did not get to their destination before dark, they could not be unloaded that night. The plaintiff gave as the reason for not saying anything to the station agent before 2:30 o'clock p. m. that he thought the cars would be taken to their destination at any time, and that he was so informed by the men in charge of the horses. At about 2:30 o'clock p. m. he was told by the agent that the cars would not be taken to their destination till after the passenger train went south, which was about 4:30 o'clock p. m. The reason given by the defendant for leaving the cars at Sidnaw was that Boyd's log track is a private logging

Burns v. Chicago, etc., Ry. Co

road, owned by the Bergland Lumber Company, and that the agreement between the said company and the defendant was that no switching was to be done upon said private track in the morning, because cars were then being loaded at various places along the track, and switching would greatly hinder the loading of cars. It appears that the Sidnaw switch engine went up the track after dinner, and took out as many loads as possible before the main line had to be cleared for the passage of the regular passenger train at 4:30 p. m. Immediately after the passage of the train, the balance of the loaded cars were taken out, and the cars in question were set in upon the track. After the cars were placed at their destination in the woods, it was dark and snowy, and somewhat stormy, and there were no facilities for unloading the horses at that point, so the plaintiff left the horses until the morning of the 9th, when temporary platforms were constructed, and the horses taken out, and fed and watered. The horses were seriously injured in health, and rendered unfit for work for a time. Upon these facts the court directed a verdict for the defendant, and the plaintiff appeals.

*Webster & Classon*, for appellant.

*Greene, Vroman, Fairchild, North & Parker* for respondent.

WINSLOW, J. (after stating the facts). The evidence clearly shows that the transportation of the horses from Oconto to Sidnaw proceeded according to the ordinary and regular course of train. The route from Oconto to Sidnaw was not a continuous line, but a combination of various lines connecting at junctions, but not traversed by any train for the whole distance continuously.

Carriage of Live  
Stock—Delays—  
Time-Tables as  
Notice.

At these junctions there were delays of hours at a time, which were indicated upon the scheduled time-tables of the defendant company, and of which shippers must take notice, and which, consequently, can form no ground for a charge of negligence. *Lowe v. Railway Co. (Ga.)*, 15 S. E. 692; *Schwab v. Union Line*, 13

Burns v. Chicago, etc., Ry. Co

Mo. App. 159. The delay at Sidnaw was under somewhat different circumstances. The cars could have been taken along by the train which left them at Sidnaw to the lead of Boyd's log track, and placed upon that lead just off the main track; but this was not the place where it was understood they were to be placed. The understanding was by all parties that they were to be placed at the further end of the log track, nearly three miles distant. This is the only reasonable construction of the contract of shipment in the light of the surrounding circumstances, and this could not be done by the heavy freight engine drawing the train because the log track was full of steep grades and curves, and was not fitted for the passage of such an engine. Nor was there any request by those in charge of the horses that the cars be left on the lead. Hence the cars were left at Sidnaw, to be taken to the place of destination by the light switch engine which was there stationed. The evidence is conclusive that this log track was a private tract, owned by the Bergland Lumber Company, which concern had, by contract, given the Holt Lumber Company the right to use it for logging operations at the time in question. The plaintiff was about to do logging for the Holt Lumber Company, and on that account only had the right to have his cars placed upon the log track. The agreement between the Bergland Company and the defendant as to the switching upon this track was that such switching was only to be done in the afternoon, because switching in the morning would seriously interfere with the loading of cars, which was proceeding at various places along the track. It was by reason of this agreement that the plaintiff's cars were not taken up to the place of destination at the end of the log track until late in the afternoon, and thus it appears that they reached the desired point in due and reasonable course of train. The Bergland Company, being the owners of the track, certainly had the right to stipulate as to the manner of its use. So we conclude that there was no neg-

Same-Same-  
Negligence-  
Sufficiency of  
Evidence.



Burns v. Chicago, etc., Ry. Co

ligence shown on the part of the defendant in the various delays in transit.

But it is claimed that the defendant should have fed and watered the horses, and was negligent in failing to do so. The evidence shows that the horses did not need to be fed or watered when they stopped at Ironwood, and the only place where it can be reasonably claimed that they should have been fed and watered is at Sidnaw, where they remained

Same—Caring for  
Stock in Transit  
—Special  
Contracts.

from 7 o'clock a. m. until nearly 5 o'clock p. m. The evidence is undisputed that the horses were loaded so closely head and tail that it was impossible to feed them on the cars, and that it would have been necessary to unload them from the cars for that purpose. The rule of common law is that, in the absence of special contract, the carrier is bound to feed and water live stock transported by it at proper intervals. 4 Elliott, R. R. § 1553. Special contracts are frequently made by which the owners assume the duty to feed and water, and such contracts are valid, and will be enforced; the duty of the carrier in such cases being discharged when it furnishes the owner or person in charge reasonable opportunities for feeding and watering in transit. *Abrams v. Railway Co.*, 87 Wis. 485, 58 N. W. 780. In the present case the special contract under which the horses were shipped provides that the owner shall "bear the expense" of feeding or watering the stock during transportation. This provision varies the common-law duty of the railway company to the extent of its terms reasonably construed, but no more. The extent of the variation in terms is simply that the owner shall bear the expense of feeding and watering. Certainly there is no reasonable construction of those words, considered alone, which would relieve the railway company from the duty of placing the cars where the horses could be unloaded by the person in charge in a case like the present, where the evidence shows that the horses could not be fed or watered while on the cars. It is argued, however, that because the plaintiff had a man in charge of the horses,

Burns v. Chicago, etc., Ry. Co

who received free transportation in order that he might look after them, the entire contract should be construed as meaning that the man in charge, or owner, assumed the duty of unloading to feed and water the stock, if unloading be necessary for that purpose. Conceding that such should be the proper construction of the contract, the company would still be obliged to furnish upon request the requisite opportunities for unloading the stock preparatory to feeding and watering. *Abrams v. Railway Co., supra.* The owner testifies positively (and his evidence seems to be undisputed on this point) that he told the agent at Sidnaw at 2:30 o'clock p. m. that the horses ought to go somewhere to be fed and watered, and that, if they did not get to their destination before dark, they could not be unloaded that night. The agent was charged with knowledge that the horses had then been on the cars more than 33 hours, and it seems to us that this statement, though somewhat indefinite, was equivalent to a request that the cars be placed at some point where such feeding and watering could be done.

Same-Same  
Requesting  
Opportunities.

Another consideration arises here, however, which does not seem to have been called to the attention of the trial court. This was an interstate contract of carriage. Section 4386 of the Revised Statutes of the United States provides, in substance, that no railroad company carrying cattle, sheep, swine, or other animals from one state to another shall confine the same in cars for a longer period than 28 consecutive hours without unloading the same for rest, water, and feeding for a period of five consecutive hours, unless prevented from so doing by storm or other accidental cause. Section 4387 provides that the owner or person in charge of the stock shall feed and water the same when so unloaded, and, if he fails so to do, the railroad company shall feed and water them at the expense of the owner or person in charge, and have a lien on the animals therefor. Subsequent sections

Same-Same-  
Interstate Ship-  
ments-Action for  
Negligence Based  
on Penal Estate.

*Burns v. Chicago, etc., Ry. Co*

provide for the recovery of a penalty by action in the name of the United States for failure to comply with any of the provisions of the two sections. There can be no doubt of the application of these sections to the present case. Under them it became the duty of the railroad company in this case to unload the horses for a rest of five hours at 9 o'clock a. m. on the morning of the 8th, while they were waiting at Sidnaw, and this duty depended on no demand or request by the owner. The law was doubtless passed for humanitarian reasons largely, but also evidently for the protection of owners of stock transported. It imposes a duty on the railroad company for the benefit of such owners, and, under familiar principles, failure to perform such duty constitutes actionable negligence at the suit of an owner who is injured thereby. Nor does the fact that a penalty is imposed for breach of such duty take the place of a civil action based on the negligence, unless such penalty be given to the injured party in satisfaction for the injury. *Smith v. Traders' Exchange*, 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504; *Klatt v. Lumber Co.*, 97 Wis. 641, 73 N. W. 563. Actions for negligence, based upon the nonperformance of this statutory duty, have been sustained by the courts of last resort in Massachusetts and Virginia upon very satisfactory reasoning. *Brockway v. Express Co.*, 163 Mass. 257, 47 N. E. 87; *Chesapeake & O. Ry. Co. v. American Exch. Bank*, 92 Va. 495, 23 S. E. 935. In the first of these cases it is said: "Under the statute above referred to it was the duty of the railroad company to unload and feed and water them [the stock] without a request from their custodian if he failed to do it." And it was further held in that case that a failure to perform such duty might become gross negligence. It is evident, therefore, that there was sufficient proof in the present case to take the case to the jury upon the question of negligence on the part of the railroad company.

But it is strenuously claimed that the evidence shows contributory negligence on the part of the plaintiff, both in

Burns v. Chicago, etc., Ry. Co

failure to attempt to unload and care for the horses at Sidnaw and in failure to unload them at night after they reached their destination. We are unable to say that contributory negligence appears, as a matter of law, at either place. At Sidnaw

Contributory  
Negligence—  
Question for  
Jury.

the evidence of the plaintiff shows that up to 2:30 o'clock p. m. the persons in charge of the horses were put off with promises that the cars would be presently forwarded; and it seems unreasonable to say that it was necessarily negligence for the plaintiff to rely on such promises, or to omit an attempt to unload and care for the horses when only two hours remained in which to do it. As to the failure to unload the horses after they reached their destination, the evidence shows that it was dark and stormy; that the stopping place was in the woods, nearly or quite half a mile from the logging camp, where there were no conveniences for unloading, but where temporary platforms for that purpose would have to be erected. There was also evidence tending to show that to attempt to unload them after dark upon a temporary platform was a hazardous undertaking, in the course of which the horses would be liable to break their legs, or otherwise injure themselves. Upon the whole evidence we think it was a proper question for the jury whether the plaintiff, in waiting until daylight before unloading the horses, was guilty of contributory negligence. No other questions are necessary to be considered. Judgment reversed, and action remanded for a new trial.

Felton v. Clarkson

FELTON

v.

CLARKSON.

*(Supreme Court of Tennessee, Nov. 11, 1899.)*

**Assignments of Error.**—The following assignment of error was insufficient to raise any question for the consideration of the supreme court: "The verdict is against the evidence and the charge of the court, and is positively against the two."

**Carriage of Live Stock—Shipping Condition.**—The law recognizes no such thing as a shipping condition of live stock as contradistinguished from their ordinary or general condition.

**Instructions.**—The court is never required to substitute the language of counsel for its own, or to incur a full and accurate charge with additional instructions requested, however sound they may be.

**Same.**—Error cannot be assigned on a refusal to give instructions requested after, and not before, the submission of the general charge.

**APPEAL** by defendant from Hamilton county circuit court.  
*Affirmed.*

*W. L. Eaiken and J. L. Foust, for appellant.*

*Richmond, Chambers & Head, for appellee.*

CALDWELL, J. S. M. Felton, receiver of the C., N. O. & T. P. Railway Company prosecutes this appeal in error to reverse a judgment for \$1,200 recovered against him by J. M. Clarkson, in the circuit court of Hamilton county, for damage to cattle shipped by Clarkson over a part of the road of that company.

The first assignment of error is in these words: "The verdict is against the evidence and the charge of the court, and is positively against the two." This assignment is wholly insufficient to raise any question for the consideration of this court. No rule of practice is better settled than that, if there is any evidence to support a verdict in a civil case, it will not be

**Assignments of Error.**

## Felton v. Clarkson

disturbed on the facts in this court, and, consequently, that an assignment of error on such a verdict, to be good, must aver that there is no evidence to sustain it, and not merely that "the verdict is against the evidence," or "against the weight or preponderance of the evidence." *Kirkpatrick v. Jenkins*, 96 Tenn. 85, 33 S. W. 819; *Packet Co. v. Hilson*, 95 Tenn. 2, 31 S. W. 737; *Poole v. City of Jackson*, 93 Tenn. 62, 23 S. W. 57; *Railroad v. Kenley*, 92 Tenn. 208, 21 S. W. 326. The averment in the present assignment, that "the verdict is against the charge of the court," means practically the same as the other averment, that it "is against the evidence" (*Railroad v. Stonecipher*, 95 Tenn. 316, 32 S. W. 208); that is, that the verdict is not that which should have been rendered under a proper application of the charge to the whole evidence. To have properly presented the supposed second objection intended to be raised by the statement, that "the verdict is against the charge of the court," it was necessary to aver that there is no evidence which under the law as charged supports the verdict. But the two intended objections can in reality be but one, in any case; and, if either be well presented, it will necessarily include the other, whether separately stated or not. If the assignment were that there is no evidence to support the verdict, that would cover the first intended objection, and could also mean that the verdict is without any support in the evidence, when the charge (the law) is applied to the facts; for it is impossible for this court to determine either that there is some, or that there is no, evidence to support the verdict, without considering the law applicable to the evidence in its relation to the cause of action.

The second assignment is that the trial judge erroneously refused to instruct the jury, upon defendant's request, as follows: "If the cattle, before and when loaded, were in bad shipping condition, from feeding them on cotton-seed meal and hulls, or other cause, and, being thus affected, they would not or could not stand up, and this was the cause of their injury and

Carriage of Live  
Stock—Shipping  
Condition.

*Felton v. Clarkson*

death, then Clarkson cannot recover." The action of the court in refusing this instruction finds conclusive justification in the fact that the charge, as given, fully and accurately instructed the jury on the question presented in the request; the instruction given being that "if the stock, before they were loaded, were in bad condition, by being fed on cotton-seed meal and hulls, or from any other cause, and if this affected them so they could not stand up, and this was the cause of their injury and death, then the plaintiff could not recover." The rejected request is almost a literal reproduction of the instruction delivered to the jury; the principal difference being that the request uses the words "bad shipping condition," instead of the words "bad condition," used in the instruction. If that difference be a material one, the advantage is with the instruction. It was enough, and best, in that particular phase of the case, to submit to the jury the simple and pertinent inquiry as to whether or not the stock were in "bad condition" when loaded; and it was not at all essential, if permissible, to require what is assumed to be a more critical and technical inquiry, as to whether or not they were in "bad shipping condition." Our law recognizes no such thing as a shipping condition of live stock, as contradistinguished from their ordinary or general condition.

Several other assignments are based upon the alleged erroneous action of the trial judge in refusing several other requests of the defendant for other instructions to the jury; but most of these requests, like that just considered, are substantially, and some almost literally, embraced in the charge given. None of them that are accurate and applicable to the evidence adduced are without an equivalent among the propositions submitted in the elaborate charge of the trial judge; hence there was no error in his refusal to give them. The court is never required to substitute the language of counsel for his own, or to incur the burden of a full and accurate charge, like the one before us, with

Instructions.

Felton v. Clarkson

additional instructions requested, however sound they may be.

But there is another conclusive answer to all of the assignments based upon the refusal of the court to instruct the jury as requested, and that is that none of the instructions requested appear to have been presented after the charge was delivered. *Roller v. Bachman*, <sup>Same.</sup> 5 Lea 158; *Railway Co. v. Foster*, 88 Tenn. 673, 13 S. W. 694, and 14 S. W. 428; *Railway Co. v. Hendricks*, 88 Tenn. 711, 13 S. W. 696, and 14 S. W. 488; *McCadden v. Lowenstein*, 92 Tenn. 614, 22 S. W. 426. "To put the trial judge in error for refusing to give special instructions to the jury, it must appear that they were requested after, and not before, he submitted his general charge; the object of such instruction being not to suggest, in the first instance, what the charge shall be, but rather to supply some omission or correct some mistake made in the general charge; to present some material question not treated at all, or to limit or extend, eliminate or more accurately define, some proposition already submitted to the jury." *Railway Co. v. Foster*, 88 Tenn. 673, 674, 13 S. W. 694. It is, of course, proper for counsel to present their views of the law to the court, orally or in writing, before his charge is delivered; "yet such presentation is not to be treated as a request for additional instructions, and made the ground for reversal if not adopted by the trial judge. The office of special or additional instructions is that already indicated." *Id.*, 88 Tenn. 674, 13 S. W. 695. Let the judgment be affirmed.



Louisville &amp; N. R. Co. v. Cooper

LOUISVILLE &amp; N. R. Co.

v.

COOPER.

*(Court of Appeals of Kentucky, March, 29, 1900.)*

**Carriage of Live Stock—Effect of Subsequent Written Contract Signed in Ignorance of Contents.\***—A written contract for the carriage of live stock purporting to relieve the carrier from a portion of its liability under a parole contract, signed by the shipper in ignorance of its contents, after the car containing the live stock is about to start for its destination, is void; and may be ignored in suing upon the parole contract.

**Same—Liability of Initial Carrier.†**—Where the initial carrier undertakes to deliver live stock at its destination, it is as responsible for its carriage by connecting carriers over whose lines a portion of the shipment has to be made as for its carriage on its own road.

**APPEAL** by defendant from Marion county circuit court.  
*Affirmed.*

*W. C. McChord* and *Lisle & McChord*, for appellant.

*H. P. Cooper*, for appellee.

**GUFFY, J:** This is the fourth appeal prosecuted by the appellant in this case, but it becomes necessary to consider the case as now presented by the record before us. It will be seen that some additional pleadings were  
Case Stated. filed after the last reversal (42 S. W. 1134), and some additional testimony presented. The plaintiff alleges, in substance, that on the 20th day of January, 1890, in the city of Linville, Tenn., the plaintiff placed in a car furnished by defendant 25 mules in good order and good

\*See 13 Am. & Eng. R. Cas., N. S., 117 *et seq.*, note.

†As to the liability of the initial carrier in the absence of a special contract, see Cincinnati, etc., Ry. Co. v. Fairbanks & Co. (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 179, and note, 187 *et seq.*

See 2 Am. & Eng. R. Cas., N. S., 649 *et seq.*, notes.

## Louisville &amp; N. R. Co. v. Cooper

condition for shipment, which mules defendant agreed and obligated itself to deliver in good order and condition to the plaintiff at Atlanta, Ga., for and in consideration of the sum of \$62.20, which sum was paid defendant on demand. It is also alleged that the same was full and fair freight charges on said mules from Linville to Atlanta. It is alleged that defendant failed to deliver said mules in good condition, but its negligence, or that of its employees, killed 2 of said mules, and otherwise damaged the remaining 23, and that the 2 killed were worth \$135 each, aggregating \$470, for which he prayed judgment. The answer of appellant contains a denial of any agreement to so ship and deliver the mules, and denies any injury to the same by it or its employees. The answer further pleads, as defense to the action, that \$62.20 was a less rate than common carrier rates, and pleaded a written contract, signed by it and plaintiff, from which it appeared that plaintiff was to be exempt from all liability for injury to the mules after they were delivered to a connecting line. It was also claimed that the plaintiff or his agent should accompany the mules, and see to them. The substance of plaintiff's reply is that the writing filed is not the contract made by the parties; that the contract between the plaintiff and defendant at Linville was an unwritten contract, by which the defendant agreed to transport the mules as aforesaid; and that such was the only contract entered into with the defendant. It is further alleged: That, after said mules had been placed in the car, and it had been attached to defendant's train, which was about to move off, defendant's agent at Linville presented and demanded plaintiff to sign the writing. That said writing was signed by him without any information or knowledge of its contents. That he did not have time or opportunity to read or examine it before the train moved off, and that it was signed by him under duress of circumstances. That at the time said writing was signed plaintiff did not know, and was not told or notified, of any connecting lines of railroad with that of defendant;

## Louisville &amp; N. R. Co. v. Cooper

on the contrary, he supposed defendant's line of road continued from Linville to Atlanta, and supposed that his mules would be transported altogether over defendant's road; and the knowledge of defendant's agent at Linville to the contrary was fraudulently withheld from this plaintiff; and said writing was obtained by fraud and duress of circumstances, and the same was and is illegal, fraudulent, null, and void. It is further denied that plaintiff entered into any contract with defendant's connecting lines, or made any agreement as to any release of defendant from liability for injury to the mules under any circumstances at all. He also denied that \$62.20 was lower than the regular rates. The rejoinder may be taken as controverting all the affirmative matter in the reply. At the April term, 1898, of the circuit court, the plaintiff was permitted to file an amended petition, which, in the main, contains averments similar to those in the reply, as well as statements of the original petition. It also, in substance, sets out that through fraud or mistake the defendant or its agents failed to correctly reduce the oral contract. The answer to the amended petition is a substantial denial of its averments, as well as a denial of the authority of the agent to contract for the delivery of the mules to Atlanta; and at the same time the plaintiff moved to transfer the cause to equity, which was resisted by defendant, and overruled by the court. The affirmative averments of the answer were controverted of record. The plaintiff, however, filed a reply. A trial resulted in a verdict and judgment in favor of plaintiff for \$470, and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

It is insisted for appellant that the court at the close of plaintiff's testimony in chief should have instructed the jury to find for defendant, and also should have given the same instruction at the close of all the testimony. The fifth ground relied on in the motion for a new trial is, in substance, that the court erred in refusing to give instructions Nos. 2, 4, 5, 6, and 7. It appears from the bill of exceptions

## Louisville &amp; N. R. Co. v. Cooper

that the plaintiff asked two instructions, which were refused upon the objection of appellant. The substance of the first instruction is that, if the jury believe, from the preponderance of the evidence, that defendant agreed to transport plaintiff's mules from Linville to Atlanta, and that the mules were injured in transit, as the result of negligence of defendant's employees, or as the result of the negligence of the employees of its connecting lines over which plaintiff's mules were transported, the jury should find for plaintiff; but, if the jury believe that the injury to the mules occurred on defendant's connecting lines, and that plaintiff, for a valuable consideration, agreed in writing or otherwise, under circumstances reasonably fair and without duress, imposture, or delusion, that defendant should not be liable for any injury to plaintiff's stock from the negligence of the employees of defendant's connecting lines, the jury should find for the defendant. The substance of No. 2 is to the effect that, if plaintiff's mules were injured while in transit from Linville to Atlanta, as a result of the negligence of the employees of the defendant or its connecting lines, then the burden is on the defendant to show by preponderance of the evidence that the injury did not occur on its lines; and, unless the jury believe that the defendant has shown by preponderance of the evidence that such injury did not occur on its lines, the jury should find for the plaintiff. The court then, on motion of plaintiff, gave the following instruction: "If the jury believe, from the preponderance of the evidence, that the plaintiff's mules were billed by defendant's agents from Linville to Atlanta, and were received and transported by defendant from Linville to Birmingham, and that said mules were transported by the Georgia Pacific Railroad Company from Birmingham to Atlanta without any agreement with the plaintiff, but under an agreement with defendant, and that plaintiff's mules were injured while in transit between Linville and Atlanta as a result of the negligence of the employees of the defendant, or of the Georgia Pacific Railroad Company, the jury should find for plaintiff such damages as

## Louisville &amp; N. R. Co. v. Cooper

the proof shows he sustained by reason of said injury, not exceeding \$470." Defendant offered instructions 4, 5, 6, and 7, which were refused by the court, and, as we think, properly so. The court then, on motion of defendant, gave the following instruction: "The court instructs the jury that, unless they believe from the evidence that plaintiff's mules were injured on the line of defendant's road, they shall find for the defendant." It may be conceded that the testimony in this case is conflicting, but it was the province of the jury to weigh and determine as to the truth of the matter. It is, however, insisted for appellant that the paper filed by it as the written contract under which the shipment was made exempts it from any liability for injury to the mules except on its own lines, which, it contends, terminated at Birmingham.

It is further contended that, if plaintiff could avoid the written contract, or have the same modified so as to conform to what he contends was the real contract, he could only do so by a petition in equity, filed for that purpose, and, after that had been done, then sue upon the contract as reformed. We do not think such contention is tenable, at least in this case. It will, however, be seen that plaintiff, by an amended petition, set out different parts of said writing, which, he alleged, were inserted, and his signature obtained thereto, by fraud and mistake or duress, and also moved to transfer this case to equity. It is the contention of appellee that his contract of shipment was in fact oral, and that the mules were received under that contract alone, and were in the car, and attached to defendant's train, and that by the terms of said oral contract defendant undertook to deliver the mules at Atlanta, and that just before the train started, on demand of the agent, and without time to read the written contract, and without any statement as to what it contained, he signed the same. The testimony of plaintiff conduces to sustain his contention, and, if it be true that he had such a contract, the signing of

Carriage of Live  
Stock—Effect of  
Subsequent  
Written Contract  
Signed in Ignorance of Contents.

## Louisville &amp; N. R. Co. v. Cooper

the written contract, under the circumstances, was a nullity, and without any consideration, and therefore void. It is also in evidence that plaintiff at the time supposed that defendant had a line of railroad to Atlanta. It does not appear that defendant asked any instruction to the effect that the contract of shipment was that it was to be responsible only for damage to the mules on its own line, except to the extent that instruction E presents that question, and it makes no reference to what the contract was. It was said by this court in *Owen v. Railroad Co.*, 87 Ky. 632,

35 Am. & Eng. R. Cas. 687, 9 S. W. 698:

Same—Liability  
of Initial  
Carrier.

"Under a contract between the parties, appellee undertook to deliver the horse at the Chicago Fair Grounds, and in order to do this the shipment had to be made after leaving the lines of appellee's road over the road of the J. M. & I. R. R. Co.; this latter company undertaking, so far as this case is now presented, to deliver the horse at the place of destination for the appellee, the L. & N. R. R. Co. The agents and employees of one road became the agents and employees of the other in so far as it affected the transportation and delivery of the horse." It seems to us that instruction No. 3, complained of, is not in conflict with the doctrine announced in the opinion, *supra*, and was not prejudicial to the substantial rights of the appellant in this case.

It is contended for appellee that the jury were authorized to believe that the injury occurred before the mules reached Birmingham. But it is not necessary for us to determine as to the weight of testimony in that respect. We perceive no error to the prejudice of the substantial rights of the appellant. Judgment affirmed.

Paddock v. Missouri Pac. Ry. Co.

## PADDOCK

v.

## MISSOURI PAC. RY. CO.

*(Supreme Court of Missouri, March 27, 1900.)*

**Courts—Appeal—Review.**—Although a decision of the Kansas City court of appeals was the law of the case on a new trial in the circuit court, it was not binding on the supreme court.

**Injuries to Live Stock—Damages—Statutes.**—In a case under section 2590, Rev. St. 1889 of Missouri, for injuries to live stock in transit by reason of defective cars, only compensatory damages are recoverable. And plaintiff's contention that the trial court had authority, under section 2597, *Id.*, to treble the damages was based on a misconception of the effect of the revision of 1889 of the state statutes.

**Same—Attorneys' Fees—Constitutionality of Statute.\***—Section 2590, Rev. St. 1889 of Missouri violates article 5 of the amendments of the federal constitution, in requiring a railroad, in an action against it for injuries to live stock in transit by reason of defective cars, to pay, in addition to the damages recovered by plaintiff, an attorney's fee of \$40, while such a fee is not required of plaintiff, if the verdict is for defendant.

**Same—Mixed Shipments—Failure to Provide Trapdoors—Presumptions—Question for Jury—Statutes.**—Section 2594, Rev. St. 1889 of Missouri provides, in substance, that where a shipper mixes two different kinds of live stock in the same car, and injury results to any of the stock, "by reason of such mixed shipment," the railroad company is not responsible. Section 2590, *Id.*, provides, in substance, that if a railroad company fails to furnish cars for the shipment of live stock with trapdoors in the roof, so that a person may enter the car therefrom, it shall be liable for all damages caused by such failure. *Held*, that, in case of injuries to live stock in transit where the shipment is mixed, and the car is not provided with such trapdoors, there is no presumption that the injuries were caused by either the mixed shipment or by the failure to provide trapdoors; and the cause of the injury is a question for the jury.

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\*See *Gulf, C. & S. F. R. Co. v. Ellis* (U. S.), 6 Am. & Eng. R. Cas., N. S., 752, and *note*, 770.

*Paddock v. Missouri Pac. Ry. Co*

**Same—Presumption of Shipper's Negligence—Validity of Contract—Public Policy.**—A provision of a contract of affreightment that it shall be presumed that an injury to live stock in transit was caused by overloading or inattention on the part of the shipper is not against public policy, and may be binding.

**Same—Same—Same—Same—Consideration.\***—If it appears that the shipper was given the option between signing a regular contract at the legal rate or a special contract containing such a provision at a reduced rate, and elected to take the special contract, he will be bound thereby. But if he was given only an option between a contract at an illegal rate, and such a special contract at a reduced rate, and took the special contract, he will not be bound thereby, because it was not based on a valuable consideration.

**APPEAL**, by defendant from Bates county circuit court.  
*Reversed.*

This is an action based upon section 2590, Rev. St. 1889, to recover the value of 5 hogs, alleged to be worth \$78. The petition charges that the defendant failed to furnish to the plaintiff a car with trapdoors in the roof thereof, one near each end, and upon opposite sides of the car, large enough to conveniently admit a man's body, as the section quoted requires; and that in consequence thereof the hogs piled up in the center of the car, the plaintiff's agent, who was accompanying them, was unable to get to them for the purpose of separating them, and 5 of the 64 hogs that were in the car, with 5 head of cattle, were overlaid and killed. The prayer of the petition was for \$78, to be trebled by the court. The case was tried in the Bates circuit court, the plaintiff recovered judgment, and the defendant appealed to the Kansas City court of appeals, where the judgment was reversed because of error in giving the second instruction for the plaintiff, in that it predicated a right of recovery in the plaintiff solely upon the ground that the defendant had failed to furnish the plaintiff a car with such a trapdoor in the roof thereof, and the hogs were shown to be dead when the car reached its destination, when there

*Case Stated.*

\*See generally *Mannheim Ins. Co. v. Erie & W. Transp. Co.* (Minn.), 161, and *notes*, 168 *et seq.*



*Paddock v. Missouri Pac. Ry. Co*

was no evidence in the case that, if there had been such a trapdoor in the roof of the car, the plaintiff's agent could, by getting into the car, have separated the hogs, and prevented their being smothered. *Paddock v. Railway Co.*, 60 Mo. App. 328, loc. cit. 340. Afterwards, in the circuit court, the defendant filed an amended answer, setting up the contract of affreightment, and claiming that the plaintiff had assumed all risk by virtue of the specific agreement entered into by him; and further claiming that sections 2590, 2597, Rev. St. 1889, are unconstitutional, in that they violate section 2 of article 10, and sections 20 and 21 of article 2, of the constitution of Missouri, and articles 5 and 8 of the amendments to the constitution of the United States, and also that they are class legislation. The reply is a general denial, with a special plea that the contract relied on by the defendant was without consideration, and therefore void, and that the rate charged the plaintiff was not a special rate given in consideration of the assumption of all risks by the plaintiff. The case was submitted to the trial court upon the same evidence as upon the first trial, and which was before the Kansas City court of appeals. The report of the case in that court does not set out the instructions in full, but it does show that only two were given for the plaintiff, and from what that court says of them we gather that they were substantially the same as those the court gave for the plaintiff as shown by the record now before us, and which are as follows:

"Instruction No. 1. The court declares the law to be that it was the duty of the defendant to furnish to the plaintiff, for the shipment of his stock, a suitable and convenient stock car, with trapdoors in the roof thereof, one near each end and upon opposite sides, large enough to conveniently admit a man's body, and near enough to the sides of the car to enable the person in charge of the car to conveniently descend to the interior of said car by means of a ladder or steps, which should be constructed directly under such doors; and if the court finds and believes from the evidence

*Paddock v. Missouri Pac. Ry. Co*

that the defendant failed to furnish to the plaintiff such car, and that by reason of such failure upon the part of the defendant the plaintiff suffered the loss of five hogs, then the court should find for the plaintiff in such sum as the court finds and believes from the evidence that such hogs were worth, not exceeding the sum of seventy-eight dollars.

"Instruction No. 2. The court further declares the law to be that, the plaintiff having shipped both cattle and hogs in the same car, the presumption is that the death of the hogs was occasioned by, and resulted from, such mixed shipment, but such presumption is not conclusive; and if the court finds and believes from the evidence that the death of the hogs was not occasioned by the fact of such mixed shipment, but from the negligence and failure of the defendant in failing to furnish a proper car, as set out in instruction No. 1, then the finding should be for the plaintiff, as in said instruction indicated, if under the evidence and said instruction No. 1 the court finds that he is entitled to recovery in the case."

The trial court found for the plaintiff in the sum of \$70.50, and trebled the same, making \$211.50, and afterwards, on motion, allowed the plaintiff an attorney's fee of \$40. After proper steps, the defendant appealed. The facts will sufficiently appear in the course of this opinion.

*R. T. Railey*, for appellant.

*Graves & Clark*, for respondent.

MARSHALL, J. (after stating the facts). 1. Although the decision of the Kansas City court of appeals was the law of the case on the trial anew in the circuit court (*May v. Crawford*, 150 Mo., loc. cit. 524, 51 S. W. 693), it is Appeal—Review. not binding on this court (*Hennessy v. Brewing Co.*, 145 Mo., loc. cit. 115, 49 S. W. 963, 41 L. R. A. 385). Notwithstanding that fact, however, we might content ourselves with reversing the judgment for the giving of the second instruction for plaintiff by the trial court, as the Kansas City court of appeals did, because the evidence,

## Paddock v. Missouri Pac. Ry. Co

which is the same here as it was there, does not furnish a basis for such an instruction; but there are questions presented by this record which go deeper than those which were presented to that court, and which, in the interest of a proper administration of the law, call for a square decision. For these reasons we shall treat the case as if it had never been decided by any appellate court.

2. This case is bottomed upon a violation of section 2590, Rev. St. 1889, and the damages assessed were trebled by the trial court, under the authority of section 2597, *Id.* The correctness of this ruling is the first proposition in this case. Sections 2590, 2591, *Id.*, are the two sections of the act of March 31, 1887 (Acts 1887, pp. 107, 108). That act was carried, *in ipsissimis verbis*, into the Revision of 1889, and those sections were numbered, by the revisers, 2590 and 2591. Section 2597, Rev. St. 1889, is section 5 of the act of March 23, 1887, carried, *in ipsissimis verbis*, into that Revision. Those acts were independant acts, as they appear in the Session Acts. For a violation of the act of March 31st (now sections 2590 and 2591), a defendant was liable only for compensatory damages; for a violation of the act of March 23d (now sections 2593-2597, inclusive), a defendant was liable, not only for compensatory damages, but for treble damages. When these two acts were carried into the Revision of 1889, they were placed by the revisers in article 2 of chapter 42, and the sections were given the numbers indicated. The plaintiff now contends that the summary of revised bills (2 Rev. St. 1889, p. 2229) shows that chapter 42, as it appears in the Revised Statutes of 1889, was enacted as a new act by the 35th general assembly, and hence the two acts referred to, though entirely different before, became a complete, new act, and all its parts must be construed together, and therefore a violation of section 2590 is now visited with the consequences, not only of having to pay compensatory damages, but also, under section 2597, with a penalty of having the actual loss trebled. On the other hand, the defendant claims that the

Injuries to Live  
Stock—Damages  
—Statutes.

*Paddock v. Missouri Pac. Ry. Co*

acts of March 31st and March 23d were totally distinct before the Revision, and that when they were carried, bodily and without change, into the Revision, they were continuations of the same laws, and not new enactments, and hence that the treble damages allowed for a violation of the act of March 23d cannot be applied to a violation of the act of March 31st. If there had been no revision of the laws, the contention of the defendant would be absolutely unanswerable. The intention of the legislature, when the Revised Statutes were adopted, is clearly expressed in section 6606, Rev. St. 1889, where it is provided: "All acts of a general nature, revised and amended and re-enacted at the present session of the general assembly, as soon as such acts take effect, shall be taken and construed as repealing all prior laws relating to the same subject; but the provisions of the Revised Statutes, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws, and not as new enactments." Sections 2590 and 2591, as also sections 2593-2597, inclusive, of the Revised Statutes of 1889, as above shown, are exactly the same as the laws of March 31st and March 23d, respectively, and therefore those sections must be treated, under this legislative direction, as mere continuations of those laws, and not as new enactments. They were entirely different laws before, and they continued to be different, notwithstanding they were carried into the Revised Statutes, and placed in the same article of the same chapter of the Revised Statutes, and notwithstanding that they may appear in the bill enacted by the 35th general assembly, which revised chapter 42. This has been the uniform ruling of this court on this question. *City & County of St. Louis v. Alexander*, 23 Mo. 483; *City of Cape Girardeau v. Riley*, 52 Mo. 428; *State v. Heidorn*, 74 Mo. 410; *Pool v. Brown*, 98 Mo., loc. cit. 680, 11 S. W. 743. A reference to a few of the incongruities that would result from any other construction will be sufficient to show that the legislature did not intend to apply the treble damages allowed by section 2597 to the failure to obey sections 2590, and

*Paddock v. Missouri Pac. Ry. Co*

2519. Thus, section 2610 of this same article 2 of chapter 42 provides a penalty for damages to railroad property, and allows the actual damage to be trebled. If section 2597 applies to the whole of article 2, the result would be the railroad company would recover nine times the actual value of the property injured. So section 2611 provides a penalty for failure on the part of a railroad to fence its track, and, in case stock is injured, the owner it allowed double the actual value, and also attorney's fees. If section 2597 applies, the owner would recover six times the value of the stock. Section 2643 provides that, if any common carrier shall do any of the things "in this act prohibited" (this was also an act passed in 1887, and carried into the Revision of 1889), the person injured should recover three times the amount of damages sustained; if section 2597 applies, the injured party would recover nine times the damages sustained. In short, article 2 of chapter 42 is largely made up of several distinct acts relating to different matters pertaining to railroad corporations, which have been put together in one article by the revisers, but which have never been molded into a single enactment by the general assembly. Each of such acts carried with it a penalty for its violation, and, when those acts were collated under the title article 2 of chapter 42, the effect was no different from what it would have been if no such collation or revision had ever been made. The penalty originally provided for a violation of each act remains the same. It follows that the circuit court erred in trebling the damages allowed for a violation of section 2590, Rev. St. 1889.

3. The allowance of an attorney's fee of \$40 is challenged, on the ground that in this regard section 2590 violates article 5 of the amendments to the constitution of the United States.

Section 2612, Rev. St. 1889, allows an attorney's fee to be taxed in favor of a plaintiff in cases where stock has been injured in consequence of a failure of the railroad company to fence its track. The constitutionality of the statute was

Same—Attorneys'  
Fee—Constitu-  
tionality of Stat-  
ute.

## Paddock v. Missouri Pac. Ry. Co

drawn in question in the case of *Perkins v. Railway Co.*, 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426, and it was there pointed out that, while such a statute had been held unconstitutional in Michigan, it had been held valid in Illinois, and the Illinois rule was followed in that case. The ruling was based upon the theory that the attorney's fee might be lawfully imposed as a penalty for the violation of the law. This decision was rendered in 1890. Since then the constitutionality of such a statute has undergone examination by the supreme court of the United States, in the case of *Railroad Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, and the statute was held to be in conflict with the fifth amendment to the constitution of the United States, and therefore void. That court, in a most exhaustive and unanswerable opinion by MR. JUSTICE BREWER, said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong, they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection." This closes the discussion; for, whatever this court thought in the *Perkins* Case as to the validity of the statute under our constitution, the supreme court of the United States says such a statute

## Paddock v. Missouri Pac. Ry. Co

violates the federal constitution, and that court's interpretation of that constitution is binding upon this and all other courts on such questions. The protection of the federal constitution has been invoked by the defendant in this regard, in this case, and we have no option but to follow that ruling. Accordingly it is adjudged error to have allowed an attorney's fee in this case, and Perkins Case, *supra*, must be regarded as no longer the law in this state on that question.

4. This was a mixed car,—that is, 64 hogs and 5 head of cattle were shipped in the same car,—and the defendant contends that under section 2594, Rev. St. 1889, and under the

terms of the contract of affreightment, the plaintiff assumed all the risk of injury to the cattle in consequence of shipping two different kinds of stock in the same car. On the other hand, the plaintiff contends, and his second instruction so told the jury, that, while the presumption of law is that the injury resulted from the mixed shipment, this presumption is not conclusive, and that it may be rebutted and overcome by the plaintiff; and in this case the jury were instructed that this presumption would be overcome if they found the negligence and failure of the defendant to furnish a car with trapdoors in the roof, so that a person could enter the car from the top, and if they further found that the injury was occasioned by such failure to so furnish such a car. In other words, while recognizing that there was a presumption flowing from mixed shipments, the plaintiff's instructions told the jury that the failure of the defendant to obey section 2590, and to furnish a car with such a trapdoor, was of itself sufficient to overcome that presumption. This was clearly error. The true meaning of section 2594 is that, where an owner mixes two different kinds of stock in the same car, and injury results to any of the stock "by reason of such mixed shipment," the railroad company is not responsible. The presumption is that the injury did result from the mixed shipment, but the shipper can overcome that presumption by showing that the injury did not result from that cause, but

Same—Mixed  
Shipments—Fail-  
ure to Provide  
Trapdoors—  
Presumptions—  
Question for Jury  
—Statutes.

## Paddock v. Missouri Pac. Ry. Co

from a cause which would have produced the injury if there had been no mixing of the stock. And the true meaning of section 2590 is that it is the duty of the railroad company to furnish cars for the shipment of stock with trapdoors in the roof, so that a person may enter the car therefrom, and that, if it fails to do so, the company is "liable to all persons damaged thereby for all damages which they may sustain on that account." There is no presumption, however, that the failure to furnish such a car was the cause of the damage. In this respect this section differs from section 2594 in reference to mixed shipments, for that section provides that in such cases the owner assumes the risks of mixing the shipment (which, however, the owner may rebut, as above indicated); whereas, section 2590 does not declare that the failure of the railroad to furnish such a car shall be any evidence or presumption that such failure caused the injury, but leaves the plaintiff to connect the failure and the injury by a preponderance of the proof, as in any other case of common-law or statutory negligence. In this case the defendant violated its duty under section 2590. The plaintiff knew that fact, and made no complaint, but undertook to fix the car as he wanted it, by putting a partition of poles across the middle of the car to separate the hogs from the stock. The bottom pole was from 18 inches to 3 feet above the floor of the car, sufficient, in either condition, to permit the hogs to pass under it, and get in with the stock. The plaintiff intended to cut a trapdoor in the roof of the car, but forgot to do so. In this condition he shipped his stock in this car from Butler to Kansas City, a distance of 73 miles. He sent his son along with the stock. The son examined the car at Passaic, Adrian, and Archie, and found the hogs piling up on each other in the middle of the car. He tried from the outside of the car to separate them, but could not do so. He testified, over the defendant's objection, that he told some of the train men in the caboose—he did not know whether it was the conductor or not—that the hogs were piling up on each other,



*Paddock v. Missouri Pac. Ry. Co*

and that he wanted an ax or hatchet to cut a hole in the roof of the car, so as to get in and separate the hogs, but the man answered him, gruffly, that he had no hatchet. Thereupon he made no further effort to separate them. When the train reached Kansas City, five of the hogs were lying in the middle of the car dead, and plaintiff's son at once sold them. Some time after the shipment the plaintiff notified the agent of the defendant at Butler that he had lost five hogs, and placed his claim upon the failure of the defendant to furnish a car with a trapdoor in the roof. No notice was given the defendant's agent at Kansas City when the car arrived there, nor was there any opportunity afforded it to ascertain in any way what caused the death of the hogs. The Kansas City court of appeals held that, upon the evidence, the plaintiff had failed to make out a case; for it was not shown that if there had been a trapdoor in the roof of the car, so that the plaintiff's son could have gotten into the car, and if, after he had gotten into the car, he had tried to separate the hogs, there is no evidence that he could have succeeded, and this evidence could have been supplied by expert stock men and shippers, who were present at the trial, but were not interrogated thereon. On the retrial of the case in the circuit court, the plaintiff stood upon the same evidence, and did not take advantage of the suggestion of the court of appeals and supply this testimony. It was a question of fact for the jury whether the failure of the company to furnish a car with trapdoors was the cause of the injury to the hogs, as it was also a question of fact for the jury whether the presumption that the injury occurred in consequence of the mixed shipment was overcome by the plaintiff's showing that the mixing did not cause the accident. It was error for the court to instruct the jury that the neglect of the defendant to furnish a car with trapdoors overcame the presumption that the injury was caused by the mixed shipment; for this left no fact to be found by the jury at all. It was conceded that the car furnished had no trapdoors. This testimony is not, in itself, sufficient to

## Paddock v. Missouri Pac. Ry. Co

connect the injury with the failure to have trapdoors, nor is it sufficient to show that the injury was not caused by the mixed shipment, and thereby to relieve the plaintiff of the risk he assumed. As this case must be retried, these questions of fact can be and should be cleared up.

5. The defendant further contends that, by the contract of affreightment, it was agreed that it should be presumed that an injury that occurred to the stock was caused by overloading or inattention on plaintiff's part. The plaintiff pleads want of consideration to support the contract. The defendant contends that the rate charged was less than the legal rate, and that such difference is the consideration for this contract. It is proper to permise the discussion of this branch of the case by saying that such a contract is not a contract exempting defendant from its own negligence. It is only an exemption from a statutory obligation or duty enacted for the benefit of the shipper, and the shipper has just as much right to waive its observance beforehand as he has to give a receipt in full afterwards for its violation, or to compromise a claim based on its violation, or to forego suit entirely. The statute imposes an obligation to the shipper, and not to the public at large; for they can have no interest in the matter. The rate charged was \$19.80. The legal rate for a standard car (a 30-foot car) allowed by section 2675, Rev. St. 1889, would be \$21 from Butler to Kansas City, or \$23.10 for a 34-foot car. The rate charged for this 34-foot car was therefore \$1.20 less than the legal rate for a standard car, or \$3.30 less than the legal rate for a 34-foot car, and defendant claims that this difference is a sufficient consideration to support this special contract. If this was all, it might be an answer to the plaintiff's contention. But it further appears that the company had a rule by which 150 per cent. was to be collected if a shipper refused to sign the special contract. Under this rule, the rate from Butler to Kansas City would be \$29.70, if the shipper refused to sign a special

Same—Presumption of Shipper's Negligence—Validity of Contract—Public Policy.

## Paddock v. Missouri Pac. Ry. Co

contract, which would be in excess of the legal rate. Therefore it is argued that, as the shipper was given only the option of signing a special contract for a lesser rate than the legal rate, or a contract for more than the legal rate, the action of the company was contrary to law, and therefore the shipper is not bound by the contract he did make. It is further argued that the company violated section 2639, *Id.*, by not posting the schedule of rates as required by that section. The penalty prescribed for a violation of section 2639 is treble the damage sustained by such violation; that is, in such a case as this treble the rate charged in excess of the legal rate. The statute limits the punishment to that amount, and the courts have no right to enlarge the penalty. *People's Ry. Co. v. Grand Ave. Ry. Co.*, 149 Mo., loc. cit. 253, 50 S. W. 829, and cases cited. *Utley v. Hill* (Mo. Sup.; not yet officially reported) 55 S. W. 1091. The statute does not declare a contract of affreightment void if more than the legal rate is charged, and the courts have no power to so declare. If it be true, as the testimony of the defendant's agent seems to indicate, that where a shipper refused to sign a special contract limiting the common-law and statutory liability of the company the agent was required to charge 150 per cent. of the rates specified in the statute tariff rate, and if this plaintiff was given only an option between such conditions, then the acceptance of such a reduced rate would not be a sufficient consideration to support such a special contract; for the shipper is entitled to know what the legal rate is, and to take his choice between shipping at that price, with the responsibility attaching thereto, or to pay the reduced rate, and to take the risk specified in such special contract. As clearly as can be gleaned from the record, no such option was given to this plaintiff. Of course, if the plaintiff knew the difference between the legal rate and the rate here charged, and with such knowledge elected to take the special rate, the contract will be binding on him, notwithstanding the failure of the company to post the tariff, or to call his attention to

## Paddock v. Missouri Pac. Ry. Co

such difference when his contract was entered into; for the posting of the tariff is only intended to give shippers an opportunity of knowing, and manifestly would be of no service to this plaintiff if he knew already, and without reference to the tariff, what the legal rate was. On the trial anew the testimony should be confined to what was done and said between plaintiff and the agent or representative of the defendant when this contract was made, and as to plaintiff's knowledge of the legal rate, and the difference between that rate and the special rate. The course of business or custom as to rates charged other persons is inadmissible, except as such testimony would tend to show plaintiff's knowledge as to the legal and special rates. Upon the whole case, if it appears that plaintiff was given his option between signing a regular contract at the legal rate or a special contract at a reduced rate, and elected to take the special contract, he will be bound thereby.

~~Same-Same-  
Same-Same-  
Consideration.~~

But, on the other hand, if he was given only an option between a contract at an illegal rate and a special contract at a reduced rate, and took the special contract, he will not be bound thereby, because it is not based on a valuable or legal consideration. If it should appear, when the case is again tried on these principles, that the special contract was entered into with knowledge as herein indicated, then, under the second covenant, the presumption will attach that the injury to the hogs resulted from overloading, or from neglect or inattention on plaintiff's part. But this is a disputable presumption, and may be overcome by competent proof that the car was not overloaded, or that the injury was caused in some other manner than by overloading or from neglect. There ought to be no difficulty in arriving at the truth with respect to the questions of fact herein referred to, when tested according to the principles of law herein laid down. But they are not sufficiently shown by this record to justify a judgment here for either party. For these reasons the

St. Louis & S. F. R. Co. *v.* Hurst

judgment of the circuit court is reversed, and the cause remanded.

GANTT, C. J., and BURGESS, J., concur as to paragraphs 1, 2, and 3, except as to overruling the Perkins Case, and dissent as to the fourth paragraph. BRACE, J., concurs *in toto*. VALLIANT, J., concurs as to all except the fourth paragraph, and dissents as to that. SHERWOOD and ROBINSON, JJ., absent.

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ST. LOUIS & S. F. R. CO.*v.*

HURST.

*(Supreme Court of Arkansas, Feb. 3, 1900.)*

Carriage of Freight—Failure to Give Notice of Loss—Exemption from Liability.\*—Where under the terms of the bill of lading it was agreed that the carrier should not be liable for loss or damage to the freight unless notice of such loss or damage was given to the delivering carrier within thirty hours after delivery, and such notice was not given, there can be no recovery for such loss or damage, if the shipper, by using reasonable diligence, could have discovered the loss or damage, and given the notice.

APPEAL by defendant from Crawford county circuit court.  
*Reversed.*

*L. F. Parker and B. R. Davidson*, for appellant.

*Chew & Fitzhugh*, for appellant.

BATTLE, J. In the complaint in this action it is alleged that the defendant, St. Louis & San Francisco Railroad Company, received from the plaintiff, Jesse Hurst, and agreed to carry, 10 boxes of household goods and other property from the town of Talahini, in the Indian Territory,

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\*See *Norfolk & W. Ry. Co. v. Reeves* (Va.), 16 Am. & Eng. R. Cas., N. S., 166 and *foot-note*; *Dixie Cigar Co. v. Southern Exp. Co.* (N. Car.), 10 Am. & Eng. R. Cas., N. S., 863, *abstr.*, and see *notes*.

St. Louis & S. F. R. Co. v. Hurst

and deliver them to the plaintiff at the town of Mountainbury, in this state; "that the defendant carelessly and negligently lost one box, of the value of \$125, and permitted other goods to be damaged in the sum of \$125, by allowing the same to become wet, and by breaking, scarring, and otherwise injuring the goods"; and for such damages the plaintiff asked for a judgment for \$250.

The defendant answered the complaint, and denied the loss of the box, and that the other goods were damaged; and alleged that by the terms of the contract of shipment of said boxes and other property it was agreed by and between the plaintiff and defendant that the railroad company should not be "responsible for loss or damage to property unless notice of such loss or damage" was "given to the delivering carrier within thirty hours after delivery," and that no such notice had been given.

The evidence adduced at the trial proved that the defendant received the 10 boxes and other property from the plaintiff for shipment from Talahini, in the Indian Territory, to Mountainbury in this state, and agreed to deliver the same to the defendant at the latter place; and that a bill of lading, in which the contract of shipment was contained, was executed by the defendant to the plaintiff. In the bill of lading is the following stipulation: "No carrier shall be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within thirty hours after delivery." Evidence was adduced tending to prove that all the property shipped, except one box of goods, was delivered to the defendant at Mountainbury; that one of the boxes was lost, and the other property was damaged; and that no notice of such loss or damage was given to the defendant within 30 hours after the property received was delivered. Evidence was also adduced tending to prove that none of the property was lost or damaged, and that all of it was delivered to the plaintiff according to the contract.

Upon this evidence the court instructed the jury, over the

## St. Louis &amp; S. F. R. Co. v. Hurst

objections of the defendant, as follows: "If the goods of plaintiff, or any of them, were lost or damaged by want of ordinary care on the part of the defendant, while in its possession, then defendant is liable for such loss or damage. If you find for plaintiff, you will assess his damage at the value of the goods lost, and the actual damage to those damaged, but not lost, if you find that any goods of his were lost or damaged as aforesaid."

And the court refused to give, at the request of the defendant, the following instructions: "If you find that under the terms of the bill of lading it was agreed that no carrier should be responsible for loss or damage to property unless notice of such loss or damage was given to the delivering carrier within thirty hours after the delivery of the goods, and that no such notice was given, you will find for the defendant.

"If you find that by the terms of the bill of lading notice should have been given to the defendant railway company of any loss or damage to property within thirty hours after the delivery of the property; that plaintiff could reasonably have given such notice within thirty hours after delivery, but did not do so,—then you will find for the defendant."

The jury returned a verdict in favor of the plaintiff for \$40. Judgment was rendered accordingly, and the defendant appealed.

In *Railroad Co. v. Ayers*, 63 Ark. 331, 38 S. W. 515, a contract for the shipment of live stock, which made it "a condition precedent to the recovery of damages to such stock that, before such stock is mingled with other stock, and within one day after delivery of the stock at destination, the shipper shall give to the carrier notice in writing of his intention to claim damages," was held to be reasonable. In this case so much of the contract as required notice of loss to be given within 30 hours after delivery was certainly reasonable. The remainder of the contract was reasonable if it allowed the shipper sufficient time, with the use of reason-

St. Louis & S. F. R. Co. v. Hurst

able diligence, to discover the damage, and give the notice; otherwise, it was unreasonable. But the trial court ignored the contract as to notice, and virtually instructed the jury to return a verdict in favor of the plaintiff for the value of the goods which were lost, if they found any were lost, notwithstanding it appeared that no notice was given within 30 hours after the delivery of the goods which were received by the shipper. The right to recover the value of the box of goods which was alleged to have been lost, the loss being shown, depended entirely upon the giving of the notice within the time stipulated. Under the contract of the parties and the issues in the case it was not sufficient to find that the box was lost to render the railroad company liable to the shipper for its value, but it was also necessary to find that the notice was given according to the contract. The instructing the jury to return a verdict in favor of the plaintiff for the value of the box of goods, if they found it was lost, was virtually telling them to return such verdict notwithstanding they should find that the notice which the shipper agreed to give was not given. This was a fatal defect in the instruction, which was not cured by any other instruction.

The entire contract of shipment was based upon a valuable consideration. The evidence does not show that it was not sufficient to sustain every part of the contract, and we will not presume that it was not. *York Mfg. Co. v. Illinois Cent. R. Co.*, 3 Wall. 107, 18 L. Ed. 170; *McMillan v. Railroad Co.*, 16 Mich. 79.

Reversed, and remanded for a new trial.

RIDDICK, J., did not sit in this case.



New York, P. &amp; N. R. Co. v. Cromwell

NEW YORK, P. &amp; N. R. Co.

v.

CROMWELL.

*(Supreme Court of Appeals of Virginia, March 22, 1900.)*

**Injury to Freight in Refrigerator Cars—Liability of Railroad.\*—**A railroad undertaking to carry produce and properly care for the same, is liable for damage to such freight caused by the negligence of the transportation company furnishing the cars for the railroad, in failing to properly ice them.

**ERROR** by a defendant to law and chancery court of city of Norfolk. *Affirmed.*

*Borland & Willcox*, for plaintiff in error.

*Heath & Heath*, for defendant in error.

HARRISON, J. E. F. Cromwell instituted this action against the California Fruit Transportation Company and the New York, Philadelphia & Norfolk Railroad Company, alleging a joint liability upon the defendants, and seeking to recover damages alleged to have been sustained by him in consequence of their failure, as common carriers, to transmit with due care certain strawberries intrusted to them for the Philadelphia and Boston markets.

It is a well-established common-law rule that in all actions of contract the plaintiff must prove his contract against as many persons as he alleged it, and he must recover against all or none. This principle has been modified by statute. Code, § 3395. We are not, however, called upon to decide whether or not the case at bar comes within the provision of the statute, as the parties have taken it from under the operation of the common law by the following agreement:

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\*See note at end of case.

New York, P. & N. R. Co. v. Cromwell

"The court certifies that the foregoing evidence, which is hereby made a part of bill of exceptions, is all that was introduced upon the trial of this cause. And the court further certifies: That after the jury had retired they returned into court, and the foreman asked the court whether the jury could find against one of the defendants and not against the other. Before the judge had responded to said inquiry, one of the counsel who was engaged in the trial—all the counsel for all parties being then present—stated that, by agreement of counsel, they could find either against both or one of the defendants, or against the plaintiff; and thereupon the judge stated to the jury that, by consent of counsel for all parties, they could find against both or either defendant, or against the plaintiff."

After the jury were informed of this agreement of counsel, they brought in a verdict in the following words: "We, the jury, find for the plaintiff against the New York, Philadelphia & Norfolk Railroad Company, and assess his damages against said defendant at \$816.64. And we find for the defendant the California Fruit Transportation Company." The court refused to set this verdict aside, and gave judgment in accordance therewith.

While insisting that neither is liable, the plaintiff in error relies chiefly upon the contention that, as between itself and the California Fruit Transportation Company, the latter is liable. The judgment in favor of the California Fruit Transportation Company has been allowed to pass unchallenged. No writ of error has been asked for or obtained to the judgment in its favor. The plaintiff in error having agreed that the jury might find against either defendant, and the California Fruit Transportation Company not being a party before this court, we are not at liberty to enter upon a consideration of the controversy as to which of the two defendants is primarily liable.

The only question presented by the record before us is as to the liability of the plaintiff in error to the defendant in error; in other words, would the plaintiff in the court below

New York, P. & N. R. Co. *v.* Cromwell

have been entitled to the judgment complained of, if the plaintiff in error had been sued alone?

The California Fruit Transportation Company is an Illinois corporation that furnishes what are known as "refrigerator cars." These cars are constructed with ice tanks holding several tons of ice, and are specially used in the transportation of fruits, vegetables, and other perishable articles. The plaintiff in error, doubtless in order that it might compete with other railroads similarly equipped, employed these refrigerator cars for the use of shippers of perishable freight over its line. The strawberries in question were delivered to and put in two of these refrigerator cars, which were then transferred to the road of the plaintiff in error, where they formed a part of its train. As the strawberries were delivered to the refrigerator cars, the receipt of that company would be given for the number of crates delivered; each receipt showing on its face that the consignment was subject to the conditions of the railroad company's bill of lading. There was no bill of lading, except that given by the plaintiff in error; and all the freight charges, including the extra charge for the use of the refrigerator cars, were paid to the plaintiff in error. It was necessary that these cars should be properly refrigerated, and kept in that condition until the fruit reached its destination, and it clearly appears that the damage sustained by the defendant in error resulted from a failure to perform that duty.

In the case of *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, a passenger occupying a Pullman car was injured by a berth falling and striking him on the head. He instituted suit against the railroad company, and recovered judgment for \$10,000 for the injuries sustained. The defense relied on was that the sleeping car in which the accident occurred was owned by the Pullman Palace-Car Company, a corporation of the state of Illinois; that holders of railroad tickets were entitled to ride in said sleeping cars, provided they also held sleeping-car tickets; that the Pullman Palace-

New York, P. & N. R. Co. v. Cromwell

Car Company, and it only, issued tickets for sale, entitling passengers to ride in its sleeping cars, and that such tickets were sold at offices established by the Pullman Car Company; that the Pullman Car Company employed persons to take charge of its cars, and the latter, while in use, were in the immediate charge of a conductor and a porter employed by that company; and that such conductor and porter were the only persons who had authority to manage and control the interior of said cars, and the berths and seats and appurtenances thereto. The lower court instructed, as part of the law of the case, that if the car in which the accident occurred composed a part of the train in which the plaintiff and other passengers were to be transported upon their journey, and the plaintiff was injured while in that car, without any fault of his own, and by reason either of the defective construction of the car, or by some negligence on the part of those having charge of the car, then the defendant was liable. This view of the law was upheld by the supreme court; JUSTICE HARLAN saying, in part:

"As between the parties now before us, it is not material that the sleeping car in question was owned by the Pullman Palace-Car Company, or that such company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passenger over its line. In performing that duty, it could not, consistently with the law and the obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency for safe conveyance was discoverable upon the most careful and thorough examination. If it chose to make no such examination, or to cause it to be made; if it elected to reserve or exercise no such control or right of inspection, from time to time, of the sleeping cars which it used in conveying passengers, as it should exercise over its own cars,—it was chargeable with negligence or failure of duty. The law will conclusively presume that the conductor and porter assigned by the

New York, P. &amp; N. R. Co. v. Cromwell

Pullman Palace Car Company to the control of the interior arrangements of the sleeping car in which Roy was riding when injured exercised such control with the assent of the railroad company. For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employees of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey."

Recognizing the higher duty due by common carriers to passengers, we are of opinion that the principles announced by the supreme court in this case are applicable to the case at bar. The employment of a common carrier, whether it be to carry passengers or freight, is a public employment; and the duty he owes as such is a public duty, calling for the exercise of a high degree of care, which should not be lightly or negligently performed.

The California Fruit Transportation Company, for a consideration, furnished its cars to the plaintiff in error. These cars were agencies or means employed by the plaintiff in error for carrying on its business and performing its duty to the public as a common carrier, one of which was to provide suitable cars for the safe and expeditious carriage and preservation of the freight it undertook to carry. A railway company cannot escape responsibility for its failure to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry by alleging that the cars used for the purposes of its own transit were the

## Note

property of another. The undertaking of the plaintiff in error was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which they were carried were owned by the California Fruit Transportation Company, or that such company undertook to ice said cars or to pay for the ice. As between the plaintiff in error and defendant in error, the California Fruit Transportation Company and its employees were the agents of the plaintiff in error. So far as the defendant in error was concerned, the plaintiff in error was under the same obligations to care for the fruit that it would have been had the refrigerator cars belonged to it.

For these reasons, the judgment is affirmed.

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NOTE.

**Carriers of Freight—Suitable Cars.**—A carrier is liable for loss of goods resulting from defects in a car used for transportation the existence of which imply negligence, although the car belonged to another and was procured by the carrier for the particular shipment at the special request of the shipper, upon his paying the additional expense, and the shipment was made in its then condition—the car being of a kind acceptable to the carrier, and commonly used in making like shipments. *Louisville & N. R. Co. v. Dies*, 91 Tenn. 177, 18 S. W. Rep. 266.

Nor will the examination and approval of the car by the shipper be a defense. *Chicago, etc., R. Co. v. Davis*, 159 Ill. 53.

A carrier which receives for transportation over its own line a carload of vendible fruit from a connecting carrier in a car which is not adapted to carrying such fruit is liable for the loss of fruit resulting from its failure to put it in a car reasonably fit for its transportation, or to notify the consignee of the condition of the car and fruit and obtain instructions in regard thereto. *Shea v. Chicago, R. I. & P. R. Co.*, 66 Minn. 102, 68 N. W. 608.

See also *Combe v. London, etc., R. Co.*, 31 L. T. N. S. 613; *Wallingford v. Columbia & G. R. Co.*, 30 Am. & Eng. R. Cas. 40, 26 S. Car. 258, 2 S. E. 19.

Oskamp v. Southern Exp. Co

OSKAMP *et al.**v.*

SOUTHERN EXP. CO.

*(Supreme Court of Ohio, Dec. 19, 1899.)*

**Carriers of Freight—Liability for Misdelivery.\***—The obligation of a common carrier of merchandise is to carry to the destination, and deliver to the consignee named in the address, unless prevented by the act of God or the public enemy; and delivery to a wrong person, not induced by some act or representation of the consignor, is not excused by any degree of care which the carrier may exercise.

(Syllabus by the Court.)

**ERROR** by plaintiffs to Ross county circuit court. *Reversed.*

Plaintiffs brought suit in the court of common pleas to recover of the express company the value of a package of diamonds in its possession as a common carrier of merchandise, consigned by them to T. M. Jones, at Hopkinsville, Ky. Numerous defenses were interposed. Upon issues joined a jury was waived, and the cause was submitted to the court. Upon request the court stated its conclusions of fact separately from its conclusions of law. The facts found, so far as they are material to the questions upon which it is thought necessary to report the case, are as follows: The said plaintiffs on and prior to the 14th day of March, 1895, were, and ever since have been, a firm formed for the purpose of doing business in Cincinnati, Ohio, and that said defendant on and prior to the 14th day of March, 1895, was, and ever since has been, a corporation organized under the laws of the state of Georgia, engaged in the business of a common carrier of goods for hire, and having an office and an agent for that purpose in the town of Hopkinsville, Ky. That on or about said 14th day of March, 1895, the defendant was in

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\*See notes at end of case.

*Oskamp v. Southern Exp. Co*

possession of the personal property, for the alleged conversion of which this case was brought, at said town of Hopkinsville, Ky. The value of said property is \$562.50. On the 14th day of March, 1895, there resided in the town of Hopkinsville, Ky., one T. M. Jones, engaged in general mercantile and dry-goods business, whose financial rating in the mercantile agencies' reports was from \$20,000 to \$30,000, with the highest credit rate allowed to that class, and that said Jones had been residing at Hopkinsville, Ky., for some years previous to said 14th day of March, 1895. On or about the 13th day of March, 1895, said plaintiffs received an order in writing through the mail, purported to be signed by T. M. Jones, of Hopkinsville, Ky., for the shipment to said Jones of the goods in controversy in this case, on memorandum; that is to say, for selection. In said purported order from T. M. Jones, the plaintiffs were referred to the mercantile agencies' reports for the commercial standing of said Jones. Upon receipt of said order, the plaintiffs consulted said agencies' reports, and discovered the rating of said Jones to be as above found. Oskamp, Nolting & Co. thereupon filled said memorandum order, by shipping the goods in controversy in a package directed to T. M. Jones, Hopkinsville, Ky., delivering same to the Adams Express Company at Cincinnati. Said goods were shipped by the plaintiffs to T. M. Jones, whom they believed to have ordered them, and relying upon mercantile agencies' reports of the financial condition of said Jones. T. M. Jones had not ordered the said goods, but said order had been written and mailed by one Abe Rothschild, who had been in Hopkinsville but two or three days prior to mailing the said order. One Tibbs, the agent for the Southern Express Company at Hopkinsville, delivered said goods to said Rothschild, upon the representation of said Rothschild that he was the T. M. Jones for whom the goods were intended. That said Rothschild was not identified as said T. M. Jones by any person other than himself, but that he showed to said agent a list of parties, among whom was Oskamp, Nolting & Co., from



*Oskamp v. Southern Exp. Co*

whom he expected goods; also, in the presence of said agent of said company, opened a package addressed to him from parties other than the plaintiffs, contents of which agreed with the list of same which he had in his possession. Tibbs was informed by said pretended T. M. Jones that he had rented a store in Hopkinsville for the purpose of establishing a jewelry store. Said pretended Jones exhibited to him keys which he claimed fitted the door of said store. Further, that said pretended Jones at no time exhibited to said Tibbs any letter, order, or paper signed by Oskamp, Nolting & Co. for the delivery of said goods to said person. Tibbs well knew of the existence of the real T. M. Jones. That said package was never offered to him for acceptance, and that said Tibbs did not in any way communicate with Oskamp, Nolting & Co. to ascertain for whom the package was intended. T. M. Jones, the dry-goods merchant doing business in said town of Hopkinsville, Ky., as aforesaid, had not at any time ordered or requested said plaintiffs to ship him, by express or otherwise, to Hopkinsville, Ky., any jewelry or other property; nor had he ever, at any time prior or subsequent to said 14th day of March, 1895, had any business transaction or dealing with said plaintiffs; nor did said plaintiffs ever have any personal acquaintance with him, or with said person who assumed the name of T. M. Jones, and who pretended to be a jeweler. As conclusions of law from the foregoing facts, the court of common pleas found: First, that there was no negligence on the part of the express company; second, that said company was nevertheless liable to the plaintiffs for the value of the merchandise. And it rendered judgment accordingly. The express company filed a petition in error in the circuit court, where the judgment of the common pleas was reversed. The consignors filed a petition in error here for the reversal of the judgment of the circuit court, and we are to determine the single question whether the judgment of the court of common pleas was appropriate to the facts which it found.

Oskamp v. Southern Exp. Co

*J. H. Cabell*, for plaintiffs in error.

*A. B. Cole*, for defendant in error.

SHAUCK, J. (after stating the facts). In the view which we take of the case, it does not seem necessary to consider when the title to goods passes from the consignor to the consignee,—whether under the general law of sales, or under the particular terms of the order which was received by the plaintiffs in this case. Nor would it be helpful to analyze the apparently conflicting decisions in which cases bearing more or less resemblance to this have been resolved according to the law of negligence. It is admitted that the carrier received from the plaintiffs merchandise which they had consigned to T. M. Jones, at Hopkinsville, Ky., and that, instead of making delivery to him, the carrier delivered it to one Abe Rothschild. Was this the performance of its contract? The bill of lading upon which, as is admitted, the carriage was undertaken, is in the record. In none of its terms having any relation to the delivery of the consignment is there any attempt to vary the duty of the carrier as it is defined by law, unless it be in the following stipulation: "It is further agreed that said company shall not in any event be liable for any loss, damage, or detention caused by the act of God, civil or military authority, or by rebellion, piracy, insurrection, or riot, or the dangers incident to a time of war, or by any riotous or armed assemblage." The duty which the law imposed upon the carrier was to transport the goods to Hopkinsville, and deliver them to the consignee named, unless prevented by the act of God or the public enemy. We need not consider whether the stipulation quoted is valid, nor whether it is more than an amplified statement of the legal exemption from liability, since no fact which would bring the case within the exemption of either the law or the stipulation is alleged or proved. This high obligation is imposed upon the carrier from considerations arising out of the fact that he has unqualified dominion of the goods for the purpose of

## Notes

carriage and delivery, and from the general course of business among consignors and consignees. The cases are numerous in which the carrier's liability has been held to be upon contract, and that delivery to the wrong person is a conversion, unless such wrong delivery is induced by the consignor. Many of the cases are collected by Mr. Hutchinson in his work on Carriers (sections 340-350, and notes). The facts found by the trial court as to the order upon which the diamonds were forwarded by the plaintiffs, and the schemes by which Rothschild persuaded the carrier's agent that he was the consignee, should not divert attention from the manifest breach of its undertaking. Rothschild's imposition upon the plaintiffs did not induce them to consign the diamonds to him. It in no way affected their order to make delivery to T. M. Jones. The forged order upon which the consignment was made to Jones was a nullity. It established no contractual relations between the consignors and Jones. But, if the plaintiffs had consigned the diamonds to Jones without having received any order whatever therefor, would it be supposed that the carrier could fill the measure of its obligation by delivering them to Rothschild? Rothschild did not gain possession of the diamonds by the misrepresentation which induced the plaintiffs to consign them to Jones. The misrepresentation effective for that purpose was made to the carrier when he persuaded its agent that he was the consignee. Judgment of the circuit reversed, and that of the common pleas affirmed.

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NOTES.

**Carriage of Freight—Liability for Misdelivery.**—A carrier is liable for goods lost by misdelivery, whether the misdelivery occurs by mistake, or by fraud or by impositions practised upon it, no matter what degree of care it has exercised.

*United States.*—Southern Express Co. v. Dickson, 94 U. S. 549; Rosenfield v. Express Co., 1 Woods 131.

*Arkansas.*—Little Rock, M. R. & T. R. Co. v. Glidewell, 18 Am. & Eng. R. Cas. 539, 39 Ark. 487.

Notes

*California*.—Cavallaro *v.* Texas & P. R. Co., 110 Cal. 348, 42 Pac. Rep. 918.

*Dakota*.—Waldon *v.* Chicago, etc., R. Co., 1 Dakota 336.

*Illinois*.—Indianapolis & St. L. R. Co. *v.* Vandusen, 81 Ill. 143; Pacific Exp. Co. *v.* Shearer, 160 Ill. 215, 37 L. R. A. 177, 43 N. E. 816; American Merchants' Union Exchange Co. *v.* Miller, 73 Ill. 224.

*Indiana*.—Merchants D. & T. Co. *v.* Merriam, 9 West. Rep. 392, 111 Ind. 5.

*Maine*.—Parker *v.* Flagg, 26 Me. 181, 45 Am. Dec. 101.

*Maryland*.—Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390, 9 Am. & Eng. R. Cas. 331.

*Massachusetts*.—Hall *v.* Boston, etc., R. Corp. 14 Allen 439, 92 Am. Dec. 783; Claflin *v.* Boston, etc., R. Co., 7 Allen 341; Forbes *v.* Boston, etc., R. Co., 9 Am. & Eng. R. R. Cas. 76; Mahon *v.* Blake, 125 Mass. 477.

*Missouri*.—Cole *v.* Wabash, St. L. & P. R. Co., 21 Mo. App. 443.

*New Hampshire*.—Smith *v.* Nashua, etc., R. Co., 27 N. H. 86, 59 Am. Dec. 364.

*New York*.—Furman *v.* Union Pac. R. Co., 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500; McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28; Scheu *v.* Erie R. Co., 10 Hun (N. Y.) 498; Oswego Bank *v.* Doyle, 91 N. Y. 32, 43 Am. Rep. 634; Colgate *v.* Pennsylvania Co., 2 Cent. Rep. 906, 102 N. Y. 120; Viner *v.* New York, Alex. & G. Co., 50 N. Y. 23; Price *v.* Oswego, etc., R. Co., 50 N. Y. 213, 10 Am. Rep. 475, 3 Am. Ry. Rep. 525, reversing 58 Barb. (N. Y.) 599.

*Pennsylvania*.—Wernwag *v.* Philadelphia, etc., R. Co., 117 Pa. St. 46, 20 W. N. C. (Pa.) 150, 32 Am. & Eng. R. Cas. 515; Graff *v.* Bloomer, 9 Pa. St. 114; Shenk *v.* Philadelphia Steam Propeller Co., 60 Pa. St. 109, 100 Am. Dec. 541.

*South Carolina*.—Carroll *v.* Southern Express Co., 37 S. Car. 452.

*Tennessee*.—Sword *v.* Young, 89 Tenn. 126, 14 S. W. Rep. 481, 604; Bloomingdale *v.* Memphis, etc., R. Co., 6 Lea 618, 6 Am. & Eng. R. Cas. 371.

*Texas*.—Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116; Pacific Exp. Co. *v.* Critzer (Tex. Civ. App.), 42 S. W. Rep. 1017.

*Vermont*.—Winslow *v.* Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365; See also *note*, 2 Am. & Eng. R. Cas., N. S., 721 *et seq.*

**Same—Identification of Consignee.**—Where a common carrier, without requiring evidence of identity, delivers to a stranger goods which have been fraudulently ordered by the latter in the name of a fictitious firm, and which have been shipped in compliance with the order, directed to the fictitious firm, he is liable to the consignor for

## Notes

their value. *Price v. Oswego & S. R. Co.*, 50 N. Y. 213, 3 Am. Ry. Rep. 525, reversing 58 Barb. 599.

**Same—Same—Presumption of Proper Delivery.**—A person confessing to be the consignee of a money package was identified by a trustworthy person as the proper consignee, to the satisfaction of the person charged with the delivery, about the time such consignee was expected to call for such a package, and told the person delivering to write his name in the receipt-book. Held that the proof of these facts was sufficient to raise a presumption of a proper delivery to the true consignee, which the consignor, in an action against the carrier, must meet by a preponderance of testimony. *Ten Eyck v. Harris*, 47 Ill. 268.

**Same—Two Persons of Same Name—Carrier as Warehouseman.**—A merchant at a distance received an order for goods, signed by the name of a party known to him and to whom he was willing to sell. There were two persons in the same place of the same name, and upon the arrival of the goods the carrier tendered them to one of the parties,—to the one that the seller supposed had ordered them—but who said he had not ordered them and refused to accept them. The carrier then stored the goods, and soon afterward the other party bearing the same name appeared with the bill of lading and the goods were delivered to him, who absconded and never paid for them. Held that he was, under the circumstances, no such misdelivery as to render the carrier liable, as it was only holding the goods as warehouseman, and only liable for a failure to exercise due diligence. *Bush v. St. Louis, K. C. & N. R. Co.*, 3 Mo. App. 62.

**Same—Delivery to Fraudulent Purchaser.**—A. B. represented himself as C. D. of P., bought goods of the plaintiff. The goods were marked for C. D. and delivered to the defendants, common carriers, who carried them to P. A. B., who was known to the defendants by his real name, applied for them as the property of C. D., and the defendants delivered them to him on his receipt, but without his producing a bill of lading which the defendants had given to the plaintiff, promising to deliver the goods to C. D. or order. There was no C. D. in P. Held, that the defendants were not liable to the plaintiff for delivering the goods to A. B. *Dunbar v. Boston & P. R. Corp.*, 110 Mass. 26.

In the absence of negligence on the part of the carrier, a merchant cannot maintain an action against it for the conversion of goods which are fraudulently ordered by a party assuming the name of the reputable merchant, and forwarded by the seller upon the financial standing of such merchant. The carrier's duty was fully discharged by carrying and delivering them to the consignee that had ordered

Bigelow v. Chicago, etc., Ry. Co

them. *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467; *The Drew*, 15 Fed. Rep. 826.

**Misdelivery, Whether Wilful Misconduct.**—A mere misdelivery of goods does not amount to wilful misconduct on the part of the company's servants so as to render it liable under a contract relieving it of all liability, except for loss or damage arising from the wilful misconduct of its servants. *Stevens v. Great Western R. Co.*, 52 L. T. 324, 49 J. P. 310.

**Same—Effect of Delivery to True Owner.**—See *Thomas v. Northern Pac. Exp. Co.*, 11 Am. & Eng. R. Cas., N. S., 121, and *note*, 124 *et seq.*

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BIGELOW

v.

CHICAGO, B. & N. RY. CO.

(*Supreme Court of Wisconsin, Sept. 26, 1899.*)

**Carriage of Freight—Breach of Contract—Defenses—Ultra Vires—Estoppel.\***—The question whether a railroad company has power to contract to transport merchandise between two points, neither of which is on its own line,—over which, however, most of the carriage is to be made, cannot be raised by the company in an action against it for damages caused by its failure to carry out such a contract.

**Authority of Agent—Sufficiency of Evidence.**—There was evidence to support the conclusion of the jury that defendant's freight agent had actual authority to make the contract in question.

**Carriage of Freight—Contracts—Consideration.**—The defendant railroad, in order to induce plaintiff to buy certain merchandise, from which it anticipated the benefit of transporting it over its own line, promised to transport it at a certain rate per ton, between two points, neither of which was on its own line, and, on the faith of such promise, plaintiff changed his position and bought the merchandise. *Held*, that this transaction embraced all the elements of a contract.

**Same—Breach of Contract—Loss of Goods—Damages.**—In an action for breach of a contract for the transportation of ice causing its entire loss, where it appears that it could have been sold at a certain price, but for such breach of contract, the measure of dam-

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\*See note at end of case.

Bigelow v. Chicago, etc., Ry. Co

ages is the loss of such price, less the shipping expenses, and less, also, such sum as plaintiff, by the exercise of reasonable diligence, after notified of the breach of the contract, could have obtained for the ice.

*APPEAL* by defendant from La Crosse county circuit court.  
*Reversed.*

In the summer of 1896 plaintiff was, and for some years had been, a dealer in ice at La Crosse, with customers to the southward, mainly on the line of the defendant's railroad and connections. Plaintiff claims that about the 1st of August the defendant's station and freight agent at La Crosse came to him, and called his attention to a quantity of ice stored at the abattoir just outside the city limits, which was for sale, and urged him to purchase it. The abattoir was located on a track of the Chicago, Milwaukee & St. Paul Railway Company. Plaintiff responded that he could not use it, as he could not reach his customers over the Chicago, Milwaukee & St. Paul Railway. The agent thereupon assured him that the defendant could and would furnish him cars at the abattoir promptly, take his ice, and ship it to southern points at the regular rates, and especially to Springfield, Ill., which was a principal shipping point for him, at the rate of \$2 per ton, free of the expenses of getting the cars to and from the abattoir, and assured him that the defendant would give him prompt shipments. The plaintiff, relying on these assurances, purchased the ice, amounting to 778 tons, at the price of 75 cents per ton. Shortly after, a customer of his from Springfield came to La Crosse, examined the ice, and agreed to buy about 600 tons of it, to be shipped from time to time to him at Springfield, provided it could be shipped over the defendant's line at a rate of \$2 per ton. Thereupon the plaintiff and the proposed customer called on the defendant's agent, who assured them they could depend on the defendant company taking and shipping the ice at the rate mentioned with promptness and in satisfactory cars. Thereupon the Springfield man agreed to purchase the ice delivered on board cars at the abattoir

Bigelow v. Chicago, etc., Ry. Co

for \$2 per ton, provided shipments could be had as promised; he to pay the freight. Plaintiff shipped one car of the ice to another customer, and one car to the Springfield customer, whereupon the Chicago, Milwaukee & St. Paul Railway refused to switch the defendant's cars to and from the abattoir; claiming it was not within the agreement between railroads for switching charges. The defendant's agent and its general freight agent attempted to negotiate arrangements with the Chicago, Milwaukee & St. Paul Railway, but did not succeed in reaching terms with them, and thereupon failed and neglected to supply plaintiff with cars as requested for the shipment of the ice, and notified him that they were unable to do so. Plaintiff made exertions to sell the ice to other parties unsuccessfully, with the result that it melted in the warehouse and was a total loss. He made no effort to secure transportation from the abattoir to defendant's tracks in La Crosse. He brought suit, and recovered a verdict for \$1,101.42 damages for breach of defendant's contract to ship. Defendant's motion to set aside the verdict as against the evidence was denied, and judgment for plaintiff entered.

*Losey & Woodward*, for appellant.

*Higbee & Bunge*, for respondent.

DODGE, J (after stating the facts). 1. The power of the corporation to make the contract in question is strenuously denied. That contract, in its ultimate analysis, was merely to transport merchandise between two points, neither of which is on its own line,—over which, however, most of the carriage was to be. While such a contract, involving either the delivery over another road beyond its own line, or the bringing of merchandise over another line to its own, has much support from well-considered decisions, we need not here decide it. Whether *ultra vires* or not, the defendant cannot raise that question against the plaintiff here. *Farwell Co. v. Wolf*, 96 Wis. 10,

Carriage of  
Freight—Breach  
of Contract—  
Defenses—*Ultra  
Vires*—*Estoppel*.



Bigelow v. Chicago, etc., Ry. Co

70 N. W. 289, and 71 N. W. 109; McElroy v. Horse Co., 96 Wis. 317, 71 N. W. 652.

2. The question of the station agent's authority to make such contract is simplified by the fact, apparent from the record, that both reliance on apparent authority and ratification were eliminated by the court below, and the jury only required to pass on the issue of actual authority, as to which the instructions are not excepted to. We need only inquire, therefore, whether there was any evidence of such actual authority. Danielson was defendant's freight and passenger agent at La Crosse, to solicit and contract for and manage the freight business done by the company at that place. The business establishments of that city extend over a considerable territory, not all within the city limits, and contiguous to different railroad tracks or to none. Any freighting business of this municipal and business settlement would seem from the evidence to fall within the scope of this agency, but defendant offered direct testimony that Danielson's agency did not extend to the abattoir in question, because not on defendant's tracks, and because outside the city limits. The significance of these distinctions is met, however, by evidence, without contradiction, that this agent, as also his predecessors, has always represented the company in its dealing with freighters on the tracks of other roads, and also with reference to certain establishments outside the city limits. In addition, certain correspondence as to this very transaction, between the agent and the general freight agent of the company, tends strongly to evidence the understanding of both that any such dealings which the company might have fell within the province and duty of Danielson. We think there was evidence to support the conclusion of the jury that he had actual authority in the premises.

3. Was there evidence that a contract to carry this ice was made? We think it plain that none was made between

Authority of  
Agent—Suffi-  
ciently of Evi-  
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Bigelow v. Chicago, etc., Ry. Co

defendant and plaintiff at the time of Mr. Baker's visit. The evidence tends strongly to show that any promise then made was to Baker, and not to plaintiff; but, even if the promise to transport the ice was then made to plaintiff, it constituted no contract, for he entered into no reciprocal agreement, nor did he change his position to his hurt. There was an entire lack of mutuality. If plaintiff's evidence is believed, however, the earlier transactions were sufficient to constitute a contract. The defendant, in order to induce plaintiff to buy the ice, from which it anticipated benefit, made the promise to transport from the abattoir to Springfield for \$2 per ton; and, on the faith of that promise, plaintiff changed his position and bought the ice. Here are all the elements of contract: A promise upon a sufficient consideration,—whether of benefit to the promisor or of injury to the promisee is immaterial, though both appear to be present. We think there was evidence to go to the jury of the making of this contract. There was also evidence of its breach, in that it appeared that Danielson notified plaintiff that defendant could not furnish him cars and take his ice from the abattoir. After definite notification to such effect, no purpose could be served by repeated demands, which both parties knew could not be complied with.

Carriage of  
Freight—Con-  
tracts—Consid-  
eration.

4. On the question of damages, the position taken by the defendant's attorneys was that the price paid by the plaintiff for the ice was the limit of his damages, from which, of course, must be deducted anything that by reasonable diligence could have been realized for the ice. The court, however, instructed the jury that as to 20 cars of ice, which the evidence showed could have been sold to Baker for \$2 per ton, if the defendant had carried out its contract, the measure of damages was the loss of this price, less the expense of loading and any other expense accompanying the shipping, and less, also, such sum as the plaintiff could have obtained for the ice upon sale to other parties, together with interest from the

Same—Breach of  
Contract—Loss of  
Goods—Damages.

## Bigelow v. Chicago, etc., Ry. Co

commencement of the suit, and, at the request of the defendant, instructed them that it was the duty of the plaintiff to exercise reasonable diligence to dispose of the ice in some other way after he found it could not be shipped to Springfield over the defendant's road. We think the rule of damages laid down by the court was substantially correct. The action was for breach of contract, not for misrepresentation. It was in evidence that the 600 tons, or 20 car loads, were absolutely sold for \$2 a ton, which sum would have been received by the plaintiff but for the defendant's breach of its contract. We see no vice in this theory. It measured the injury which the plaintiff received by reason of the defendant's breach, as shown without conjecture or uncertainty. The damages awarded upon the verdict were evidently upon the theory that 570 tons of ice (being the 20 car loads, less 1 car load as to which no breach occurred) were lost to the plaintiff, and would have yielded him \$2 per ton, less about 10 cents per ton for loading. There is evidence to support the proposition that plaintiff made reasonably diligent efforts to sell this ice to others, without success, and that he was unable to satisfy his contract with Baker, or otherwise to dispose of the ice to customers whom he could reach by shipment over the Chicago, Milwaukee & St. Paul road; but it is admitted there was no effort on his part to overcome the obstacle between the abattoir and the tracks of the defendant railroad at La Crosse. It needs no evidence to show that, if he had tendered the ice upon the tracks of the defendant within that city, he could have fulfilled his sale and realized his \$2 per ton. Nor does it require any evidence—although evidence there is—to establish that he might have shipped the ice from the abattoir over the Chicago, Milwaukee & St. Paul road into the city of La Crosse; and, while the expense to him is not rendered entirely certain, there is enough in the evidence to show that it must have fallen far below the \$2 per ton damages which he claims. There might almost be said to be common knowledge that if the rate of carriage from La Crosse to Springfield, Ill.,

## Bigelow v. Chicago, etc., Ry. Co

were \$2 a ton, the rate for the few miles from the abattoir to La Crosse city would have been but a small fraction of that; and it was shown that, even if the ice needed to be changed from one car to another after reaching La Crosse, the expense of that transaction was but a trifling percentage of \$2 per ton. The plaintiff offered in evidence a letter from the general freight agent of the defendant wherein it is stated, somewhat ambiguously, that a five-mile haul from the abattoir to La Crosse would, at full tariff rates, cost but 3 cents per hundred, or 60 cents per ton. It is also matter of common knowledge that it was physically possible to haul this ice by teams from the abattoir to some point on the defendant's tracks within two miles of it; and it appears, by plaintiff's own testimony, that some negotiation took place between him and defendant's agent with reference thereto, and he offered in evidence two letters from that agent to his superior, one stating that the ice could be hauled at from 25 to 30 cents per ton, and the other indicating estimates by the plaintiff himself of 35 cents per ton. It was, of course, the duty of the plaintiff, before allowing this ice to spoil and become entirely lost, to make every reasonable exertion to realize from it. If he could not sell to others, and could have availed himself of this sale by incurring additional expense, it was his duty to incur that expense, so long as it was less than the damage otherwise to result; and it appearing affirmatively that he made no exertion whatever in the latter direction, and there being evidence showing that the expense thereof would have been far less than the damage now claimed to have been suffered, we think it clear that the amount of the verdict recovered is not sustained by the evidence. Whether, as shown by Mr. Danielson's letter, this ice could have been placed upon the defendant's cars on its own tracks by the use of teams at an expense of 30 cents per ton, or whether it would have cost the 60 cents for local freight tariffs over the St. Paul, the evidence is perhaps too indefinite to make clear; and we do not, therefore, feel justified in specifying a minimum to which the plaintiff, in his option,

## Note

may remit, but are satisfied that the evidence shows that he might have avoided the loss of this ice, by reasonable diligence, at an expense far less than the amount of the present recovery. For that reason the verdict should have been set aside, upon defendant's motion, as not supported by the evidence, and a new trial awarded. Judgment of circuit court reversed, and cause remanded for a new trial.

## NOTE.

**Executed Contracts—Ultra Vires—Railroad Estopped.**—When a railroad corporation has entered into a contract and actually received the consideration, it is held that it is estopped to set up the defence of *ultra vires*. *Zabriskie v. C. & C., etc., R. Co.*, 23 How. 381; *Railroad Co. v. Howard*, 7 Wall. 413; *Southern Pac. Co. v. United States*, 28 Ct. of Cl. 77; *Long v. Georgia Pac. R. Co.*, 91 Ala. 519, 8 So. Rep. 706; *Nashua & L. R. Co. v. Boston & L. R. Co.*, 16 Am. & Eng. R. Cas. 448; *Hazelhurst v. Savannah, etc., R. Co.*, 43 Ga. 54; *Racine, etc., R. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 346; *Peoria & S. R. Co. v. Thompson*, 7 Am. & Eng. R. Cas. 101; *State Board of Agriculture v. Citizens' St. R. Co.*, 47 Ind. 407; *Louisville, N. A. & C. R. Co. v. Flanagan*, 32 Am. & Eng. R. Cas. 532, 113 Ind. 488, 12 West. Rep. 190, 14 N. E. Rep. 370; *McCluer v. Manchester, etc., R. Co.*, 13 Gray 124; *Dewey v. Toledo, A. A. & N. M. R. Co.*, 50 Am. & Eng. R. Cas. 607, 91 Mich. 351, 51 N. W. Rep. 1063; *Manchester & L. R. Co. v. Concord R. Co.*, 47 Am. & Eng. R. Cas. 359, 66 N. H. 100, 20 Atl. Rep. 383; *Bissell v. Michigan, etc., R. Co.*, 22 N. Y. 258; *Woodruff v. Erie R. Co. et al.*, 16 Am. & Eng. R. Cas. 501; *Cunningham v. Massena Springs & Ft. C. R. Co.*, 44 N. Y. S. R. 723, 63 Hun 439, 18 N. Y. Supp. 600; *affirmed in* 138 N. Y. 614, mem., 51 N. Y. S. R. 933, 33 N. E. Rep. 1082; *Chapman v. M. R., etc., R. Co.*, 6 Ohio St. 137; *Chaffee v. Rutland, etc., R. Co.*, 16 Am. & Eng. R. Cas. 408; *Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160, 16 Am. Ry. Rep. 322; *Oil Creek & Allegheny River Co. v. Penna. Trans. Co.*, 73 Pa. St. 160.

Chicago, M. & St. P. Ry. Co. *v.* Tompkins *et al*

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY

*v.*

TOMPKINS *et al.*, BOARD OF RAILROAD COMMISSIONERS OF  
SOUTH DAKOTA.

(*Supreme Court of the United States, January 22, 1900.*)

**Reasonableness of Rates—Appeal—Review.**—Whether prescribed maximum fares and charges for the interstate transportation of passengers, freight and cars, by a railroad are reasonable, can only be determined by comparing the gross receipts of such railroad from its business within the state with the expenses incurred in producing those receipts; and on appeal, where the findings of fact by the trial court are not sufficient to enable the supreme court to make this comparison, the case should be remanded with instructions to refer it to some competent master to report fully the facts, and to proceed upon such report as equity shall determine.

**APPEAL** by complainant from a decree of the circuit court of the United States for the district of South Dakota.  
*Reversed.*

**Statement by MR. JUSTICE BREWER:**

On February 3, 1897, the legislature of South Dakota passed an act relating to common carriers. Laws of 1897, chap. 100. The act provided for the appointment of a board of railroad commissioners, and by § 20 this board was authorized to make a schedule of reasonable maximum fares and charges for the transportation of passengers, freight, and cars on the railroads within the state. There was a proviso in the section that the maximum charge for the carriage of passengers on roads of standard gauge should not be greater than 3 cents per mile. On August 26, 1897, the board of railroad commissioners, having taken the preliminary steps required by the statute in respect to notice, etc., made and published its schedule of maximum charges for the control

Chicago, M. & St. P. Ry. Co. v. Tompkins *et al*

of all local railroads. On the next day the Chicago, Milwaukee, & St. Paul Railway Company, plaintiff and appellant, filed its bill in the circuit court of the United States for the district of South Dakota, seeking to restrain the enforcement of such schedule. The bill alleged generally that the existing rates were fair and reasonable; that those established by the railroad commissioners were unjust and unreasonable; would not only fail to afford the plaintiff adequate compensation for the services to be performed, but also would operate to deprive it of its property without just compensation. The railroad commissioners filed their answer on October 4, 1897, in which they alleged that the existing rates were extortionate and unreasonably high—in many instances so high as to prohibit the shipment of ordinary products; that the freight rates were much higher than those charged by the complainant company for similar services upon its lines of railway in other and adjoining states, being about 90 per cent. higher than the rates charged in the state of Iowa; that the passenger rates were at least 25 per cent. higher than those charged by the plaintiff over its lines of railway in other states, and much higher than those charged by other railway companies for like transportation in other states. In addition to these matters the answer averred that the plaintiff and the Chicago & Northwestern Railway Company were owners of competing lines of railway, running westerly from Chicago and traversing the states of Illinois, Wisconsin, Minnesota, and Iowa; that during the years from 1880 to 1883 as competing companies they constructed their lines of railway into and through that part of the then territory of Dakota, now the state of South Dakota; that at that time there were no people, business, or industry to be accommodated or served by the construction of said lines of railway, and that the construction was not in response to any existing demand for the same, but was for the purpose pre-empting and occupying the territory in anticipation of its settlement and development; that a rapid occupation followed such extension of railroad lines, and a large immigration flowed into the territory; that

Chicago, M. & St. P. Ry. Co. v. Tompkins *et al*

this rapid immigration ceased in 1884, and that many of the settlers disappeared in the years following, so that in certain portions of the territory there was almost a depopulation; that going in thus early the plaintiff acquired its right of way, depots, and terminal grounds at a substantially nominal cost; that the capitalization of the railroad, in stocks and bonds, was fixed during this period of excitement and rapid immigration, had never been changed, and was extravagantly high. The answer also contrasted the value of the property as shown by such capitalization in stocks and bonds and that returned by the railroad company to the state for the purposes of taxation. It also averred that the Dakota lines were of much greater earning value to complainant than the mere *pro rata* mileage of the lines in that state would indicate, and that no account had been taken or allowance made for the value to the plaintiff of the long-haul business done on other parts of its lines afforded by the interstate business running into Dakota. Upon the issue thus presented by these pleadings testimony was taken before an examiner. This testimony is preserved in the record, and amounts to several hundred printed pages. The examiner simply reported the testimony, without any findings of fact or conclusions of law. The case went to hearing before the district judge, who, without the aid of a master, examined the pleadings and this volume of testimony, and, on July 20, 1898, rendered a decree dismissing plaintiff's bill. 90 Fed. Rep. 363. Besides delivering an opinion, the court made the following findings of facts and conclusion of law:

"This cause came on to be heard upon the pleadings and proofs at this term and was argued by counsel; and thereupon, upon consideration thereof, the court finds the following facts:

"I. That the value of complainant's property in the state of South Dakota is ten million dollars.

"II. That the fair value of the proportion of complainant's said property assignable to local traffic was, for the year ending June 30, 1894, \$2,200,000, and for the year end-



Chicago, M. & St. P. Ry. Co. v. Tompkins *et al*

ing June 30, 1895, \$2,600,000, and for the year ending June 30, 1896, \$2,100,000, and for the year ending June 30, 1897, \$1,900,000.

"III. That the gross local earnings of complainant in the state of South Dakota for the fiscal year ending June 30, 1894, was \$407,606.35, and for the year ending June, 30, 1895, was \$330,642.85, and for the year ending June 30, 1896, was \$328,105.95, and for the year ending June 30, 1897, was \$311,085.42.

"IV. That the local earnings on the complainant's lines under existing tariffs, on the same proportion of the total value of the roads in South Dakota as the local earnings bear to the gross earnings from all sources in South Dakota, were: For the year 1894, 18.5 per cent.; for the year 1895, 12.7 per cent.; for the year 1896, 15.6 per cent.; for the year 1897, 16.3 per cent.

"V. That applying the schedule of rates sought to be enjoined in this action to the local traffic during the years above mentioned, on the same method of calculation, the value of complainant's property assignable to local traffic would be for the years ending June 30, 1894, \$1,900,000; June 30, 1895, \$2,300,000; June 30, 1896, \$1,800,000; June 30, 1897, \$1,600,000.

"VI. Under the commissioners' schedule the gross earnings from local traffic would have amounted to the sum of \$342,381.98 for the year ending June 30, 1894, and \$277,518.40 for the year ending June 30, 1895, and \$275,607.79 for the year ending June 30, 1896, and \$261,295.21 for the year ending June 30, 1897.

"VII. That these earnings for the fiscal year 1894 would equal 18 per cent. of the value thus ascertained, and for the 1895 would equal 12.1 per cent. and for the year 1896 would equal 15.3 per cent. and for the year 1897 would equal 16.2 per cent.

"VIII. That owing to the small difference between the percentage earned under the complainant's schedule of rates and fares and the commissioners' schedule of rates and fares

Chicago, M. & St. P. Ry. Co. v. Tompkins *et al*

for the four years prior to the commencement of this suit, and owing further to the amount of the percentages which would have been earned during said four years under the commissioners' schedule, the court is unable to find beyond a reasonable doubt that the local earnings under said commissioners' schedule would not during the years aforesaid have earned the reasonable cost of earning said local earnings and some reward to the owner of the property over and above said cost of operation.

"IX. That the court is unable to find from the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896, and 1897 was.

"X. As a conclusion of law the court finds that the enforcement of the proposed schedule of reasonable maximum rates and fares will not deprive the complainant of its property without due process of law, or deprive it of the equal protection of the laws, or operate to take the property of complainant for public use without just compensation."

From the decree thus entered the plaintiff took its appeal to this court.

*Messrs. A. B. Kittredge and George R. Peck*, for appellant.  
*Messrs. T. H. Null, John L. Pyle and W. O. Temple*, for appellees.

MR. JUSTICE BREWER delivered the opinion of the court:

Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws, and not of men; and by this court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are con-

Chicago, M. & St. P. Ry. Co. v. Tompkins *et al*

strained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state, or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution. Railroad Commission Cases, 116 U. S. 307, *sub nom.*; Stone v. Farmers' Loan & T. Co., 29 L. Ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. Rep. 1028; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. Ed. 377, 9 Sup. Ct. Rep. 47; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. Rep. 462, 702; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. Rep. 484; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418.

It is often said that the legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the inference is carried too far. Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene. A single illustration will make this clear: It is within the competency of the leg-

Chicago, M. & St. P. Ry. Co. *v.* Tompkins *et al*

islature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates.

In approaching the consideration of a case of this kind we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld.

Such being unquestionably the law, it is obviously of the utmost importance that the facts shall be clearly and accurately found and distinctly stated by the trial court, and that those facts shall sustain the conclusion reached.

We are of opinion that neither the findings made by the court, nor such facts as are stated in its opinion, are sufficient to warrant a conclusion upon the question whether the rates prescribed by the defendants were unreasonable or not, and we are also of opinion that the process by which the court came to its conclusion is not one which can be relied upon. The court proceeded upon the theory that a comparison of the actual gross receipts of the company from its South Dakota local business with those which it would have received if the rates prescribed by the defendants had been in force was sufficient to determine the question of the reasonableness of these latter rates, and instituted such comparison with respect to the four years preceding the commencement of this suit. Now, it is obvi-

Chicago, M. & St. P. Ry. Co. v. Tompkins *et al*

ous that the amount of gross receipts from any business does not of itself determine whether such business is profitable or not. The question of expenses incurred in producing those receipts must be always taken into account, and only by striking the balance between the two can it be determined that the business is profitable. The gross receipts may be large, but if the expenses are larger surely the business is not profitable. It cannot be said that the rates which a legislature prescribes are reasonable if the railroad company charging only those rates finds the necessary expenses of carrying on its business greater than its receipts.

In the light of these general and obvious propositions we proceed to examine the computations and reasoning of the court. For reasons which will be apparent hereafter we do not stop to inquire whether its findings are correct deductions from the testimony, but take them as they are stated. It may be premised that the books of the plaintiff, showing its business for the four years, were examined, and so much as was deemed necessary admitted in evidence. From those books was disclosed with mathematical accuracy the gross receipts of the company on all its business in all the states during each of the four years and the actual cost of doing that business during each of those years; also the gross receipts from the business done in South Dakota, and separately the amount which was received in that state from interstate business and that from local. If the schedule of rates prescribed by the defendants had been in force during the four years, and the same amount of business had been done by the company, the reduction in gross receipts from the passenger business would have been 15 per cent., and from the freight business 17 per cent. Of course, the cost of doing the business would be substantially the same. The court found the value of the plaintiff's property in South Dakota to be \$10,000,000, although, according to the testimony, it was bonded for over \$19,000,000. It held that it was not fair to consider that sum, \$10,000,000, the value of the property employed in doing local business, for it was

Chicago, M. & St. P. Ry. Co. *v.* Tompkins *et al*

also used in doing interstate business; and that the true way to determine the value of the property which could be regarded as employed in local business was by dividing the total value of \$10,000,000 in the same proportion that existed between the amount of gross receipts from interstate business and that from local business, each of which amounts was, as we have seen, accurately shown by the testimony. Upon that basis of division it found that the value of the company's property employed in local business was for the first year, \$2,200,000; the second year, \$2,600,000; the third year, \$2,100,000, and the last year, \$1,900,000, and also that the gross receipts from local business were for the first year, 18.5 per cent. of the valuation; for the second year, 12.7 per cent.; for the third year, 15.6 per cent.; and for the last year, 16.3 per cent. In other words, for these several years the company received as compensation for doing its local business the per cent. named of the real value of the property used in doing that business. Then, proceeding on the supposition that the defendants' schedule had been in force and the rates reduced as therein prescribed during these four years, it divided the valuation of \$10,000,000 on the like proportion of the receipts from interstate business to the receipts from local business as thus diminished, and upon such division found that the valuation of the plaintiff's property engaged in local business would have been, for the first year, \$1,900,000; for the second year, \$2,300,000; for the third year, \$1,800,000; and the last year, \$1,600,000; and upon such basis that the gross receipts from local business would have amounted to 18 per cent. of the value of the property for the first year, 12.1 for the second, 15.3 for the third, and 16.2 for the last. Upon this it held that the difference between the per cent. of receipts in the two cases was slight, and that there was no change in what may rightfully be called the earning capacity of the property sufficient to justify a declaration that the reduced rates prescribed were unreasonable. In other words, it was of the opinion that the

Chicago, M. & St. P. Ry. Co. v. Tompkins *et al*

earning capacity was so slightly reduced that it could not be affirmed that the new rates were unreasonable.

But that there was some fallacy in this reasoning would seem to be suggested by the fact that although the defendants' schedule would have reduced the actual receipts 15 per cent. on the passenger and 17 per cent. on the freight business, the earning capacity for the last year was diminished only 1-10 of 1 per cent. Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was \$10,000,000, and the total receipts both from interstate and local business were \$1,000,000, one half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be \$5,000,000, and the per cent. of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one-fifth of what they had been, so that instead of receiving \$500,000 the company only receives \$100,000. The total receipts for interstate and local business being then \$600,000, the valuation of \$10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers \$8,333,000, and to that engaged in earning local receipts \$1,667,000. But if \$1,667,000 worth of property earns \$100,000 it earns 6 per cent. In other words, although the actual receipts from local business are only one-fifth of what they were, the earning capacity is three-fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as \$8,333,000, and it earned \$500,000, its earning capacity was the same as that employed in local business—6 per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity

Chicago, M. & St. P. Ry. Co. *v.* Tompkins *et al*

of the property employed in interstate business as in that employed in local business, in which the rates are reduced.

Again, in another way, the error of the court's computation is manifested. The testimony discloses that the operating expenses of the entire system during each of the four years were over 60 per cent. of the gross receipts. If the cost of doing local business in South Dakota was the same as that of doing the total business of the company, then the net earnings of that local business would not exceed 40 per cent. of the gross receipts. Reduce the gross receipts 15 per cent.—and the reduction by the defendants' rates was 15 per cent. on passengers and 17 per cent. on freight business—it would leave only 25 per cent. of the gross receipts as what might be called net earnings, to be applied to the payment of interest on bonds and dividends on stock. But the testimony shows that the cost of doing local business is much greater than that of doing through business. If it should be 85 per cent. of the gross receipts (and there was testimony tending to show that it was as much if not more) then a reduction of 15 per cent. in the gross receipts would leave the property earning nothing more than expenses of operation. These computations show that the method which the court pursued was erroneous, and that without a finding as to the cost of doing the local business it is impossible to determine whether the reduced rates prescribed by the defendants were unreasonable or not.

But here we are confronted by the ninth statement in the findings of fact, to wit, "that the court is unable to find from the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896, and 1897 was." If the court meant by that to say that there was no testimony tending to show what was the cost of doing local business, we are constrained to say that the statement is erroneous, because there was abundance of testimony bearing upon that question. If it meant simply that it could not determine that fact with mathematical accuracy, basing it upon testimony of the exact amount of money



Chicago, M. & St. P. Ry. Co. v. Tompkins *et al*

paid out for doing such work, it is undoubtedly true, but there are many things that have to be determined by court and jury in respect to which mathematical accuracy is not possible. Take the ordinary case of condemnation of real estate, the value is to be determined by the trial tribunal, whether jury or court, and yet no one is able to state the exact value. In this very case the court fixed the value of the company's property in South Dakota at \$10,000,000, and yet it is impossible from the testimony to say that this conclusion was absolutely accurate, that there was testimony tending to show to a dollar such value. Beyond the figures given from the books of the company of the actual cost of doing the total business of the company there was the testimony of several experts as to the relative cost of doing local and through business. Such testimony is not to be disregarded simply because it cannot demonstrate by figures the exact amount or per cent. of the extra cost. It is obvious on a little reflection that the cost of moving local freight is greater than that of moving through freight, and equally obvious that it is almost if not quite impossible to determine the difference with mathematical accuracy. Take a single line of 100 miles, with ten stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same, but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks is greater; there are the wages of the employees at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local

Chicago, M. & St. P. Ry. Co. v. Tompkins *et al*

and through freight. It is impossible to distribute between the two the relative cost of carriage. Yet that there is a difference is manifest, and upon such difference the opinions of experts familiar with railroad business is competent testimony, and cannot be disregarded.

We think, therefore, there was error in the failure to find the cost of doing the local business, and that only by a comparison between the gross receipts and the cost of doing the business, ascertaining thus the net earnings, can the true effect of the reduction of rates be determined.

The question then arises, What disposition of the case shall this court make? Ought we to examine the testimony, find the facts, and from those facts deduce the proper conclusion?

It would doubtless be within the competency of this court on an appeal in equity to do this, but we are constrained to think that it would not (particularly in a case like the present) be the proper course to pursue. This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court. Doubtless if such determination is challenged on appeal it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. The writer of this opinion appreciates the difficulties which attend a trial court in a case like this. In *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418, a similar case, he, as circuit justice presiding in the circuit court of Nebraska, undertook the work of examining the testimony, making computations, and finding the facts. It was very laborious, and took several weeks. It was a work which really ought to

Chicago, M. & St. P. Ry. Co. v. Tompkins *et al*

have been done by a master. Very likely the practice pursued by him induced the trial judge in this case to personally examine the testimony and make the findings. We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a state in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests.

We are aware that the findings made by the master may be challenged when presented to the trial court for consideration, and it may become its duty to examine the testimony to see whether those findings are sustained, as likewise if sustained by the trial court it may become our duty to examine the testimony for the same purpose. But before we are called upon to make such examination we think we are entitled to have the benefit of the services of a competent master and an approval of his findings by the trial court. As we have said, those findings may not be challenged by either party, and if so a large burden will be taken from the appellate court.

For these reasons we not merely *reverse the decree of the trial court*, but also remand the case to that court with instructions to refer the case to some competent master to report fully the facts, and to proceed upon such report as equity shall require.

Blair v. Sioux City & P. Ry. Co

BLAIR

v.

SIOUX CITY & P. RY. CO. *et al.*

HOLLAWAY v. SAME. BROWN v. SAME. MACOY v. SAME.

(*Supreme Court of Iowa, Oct. 18, 1899.*)

Joint-Freight Rates—Extortion and Discrimination—Statutes.—A section of a statute of Iowa, which is constitutional, prohibiting extortion and discrimination in freight charges, applies where joint rates are voluntarily established between two or more railroads.

Same—Same—Forming New Line.\*—When two or more railroad companies voluntarily enter into an agreement for joint rates, which covers all stations upon the line in any given state they virtually create a new and independent line, which is subject to a law prohibiting unjust discrimination and unreasonable exaction by means of freight charges.

Same—Same—Same.—Under the statutes of Iowa it is *prima facie* unlawful for railway corporations that have voluntarily established joint rates to charge a higher rate for a shipment made over one of the lines to a point west on another line than it does for a like contemporaneous shipment from the initial point to a point east of the junction with such other line.

Corporations—Interrogatories.—A defendant corporation may be required to answer interrogatories attached to a petition.

Same—Same.—The officers of corporations, in answering such interrogatories, must make use of all the sources of information available.

Same—Same.—Where some of such interrogatories are material, an objection which goes to the whole, and not to particular ones, is without merit.

Rehearing.—Points not raised at the original submission of a case will not be considered on rehearing.

Penal Statutes—Damages—Interest.—Interest from the time the cause of action accrued should not be allowed on the damages recovered under a penal statute, where the statute does not provide for the allowance of such interest.

Remittur.—The plaintiff in such an action may be permitted to remit an amount improperly allowed as interest on the damages.

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\*See note at end of case.

Blair v. Sioux City & P. Ry. Co

APPEAL by defendants from Pottawattamie county district court. *Modified.*

*Hubbard, Dawley & Wheeler*, for appellants.

*Harl & McCabe* and *Spenser Smith*, for appellees.

DEEMER, J. Between January 1, 1889, and the bringing of these suits, in 1893, plaintiffs shipped many cars of baled hay from Whiting and Blencoe, Iowa, a station on the line of the Chicago & Northwestern Railway.

Case Stated.

Each original petition alleged that defendants "charged, demanded, and received of plaintiff for the said shipment the sum of two local tariffs of said lines from Whiting (or Blencoe) to Missouri Valley, and from Missouri Valley to Council Bluffs; that at and about the time said shipments of baled hay were made \* \* \* the defendant corporations were charging on shipments of baled hay from said stations of Whiting [and Blencoe] to points on the Chicago & Northwestern Railway east of Missouri Valley, and for like distance from the point of shipment at Council Bluffs, the joint-rate tariff fixed by the board of railway commissioners of the state of Iowa, which joint-rate tariff was less for like distances than the sum of the two locals charged by these defendants on the shipments made about the same time of the same merchandise, and for like distance, to points on the defendants' roads." It then stated that the charge of the sum of the two local tariffs as aforesaid was in excess of the joint rate for the like distance as fixed by the railway commission; that said charge was a violation of the joint-rate law, and constituted an unjust discrimination, and was an unreasonable and extortionate charge; that plaintiff was damaged, by reason of said extortionate and unjust charges and discrimination and charges in excess of joint rates fixed by said railway commission, a certain sum, which was stated; that more than 15 days before the commencement of this action written notice and demand were made upon each of said defendants for the amount of damages accruing to plaintiff on each of said shipments, and defendants have failed to pay

Blair v. Sioux City & P. Ry. Co

the same, whereby they have become liable to plaintiff in three times the amount of the said damages, and judgment is claimed for said sum. The defendants demurred to these petitions upon the ground that there was no law requiring the defendants to make a joint rate for the shipment of freight over their lines; that the provisions of chapter 28, Acts 22d Gen. Assem., and of chapter 17, Acts 23d Gen. Assem., are unconstitutional, being in violation of the federal and state constitutions; that the board of railway commissioners had no authority to fix a joint rate for shipments over the defendants' lines of railway; that it was not unlawful for each of the defendants to charge its regular local tariff rate for transporting said hay; that it was not unlawful for the defendants to charge in the aggregate for said shipments the sum of two local tariffs on said lines; that it was not averred that the board of railway commissioners had given notice to defendants of the hearing at which the alleged joint rates were fixed; and that there is no joint liability of the defendants shown by the petition. Said demurrer was overruled, and thereafter each plaintiff filed an amendment to his petition, alleging that the shipments which have been referred to in the petition herein were through shipments from Whiting to Council Bluffs; that through billing was issued therefor, and a through rate for the transportation thereof fixed, demanded, and received by the defendants; that the said rates so fixed, demanded, and received by the defendants for transportation of said hay equaled the sum of the two local tariffs from Whiting to Missouri Valley, and from Missouri Valley to Council Bluffs; and that said charge was unreasonable, unjust, extortionate, and discriminating, in excess of joint rate fixed by the board of railway commissioners of the state of Iowa, and in excess of the joint rates fixed and charged by the defendants for joint shipments of like character for like distances on their respective lines at or about the time of the shipments in controversy herein, as is more fully alleged in plaintiff's original petition. To the petition as amended the defendants

## Blair v. Sioux City &amp; P. Ry. Co

again demurred for substantially the same reasons set out in their first demurrer. Before this demurrer had been ruled upon, the plaintiff again amended his petition, alleging: That the through billing of the hay was made by defendants in pursuance of a contract or agreement entered into between defendants for the through transportation of freight over their respective lines, and establishing between them joint through rates for such transportation of freight from points on the Sioux City & Pacific Railway to points on the line of the Chicago & Northwestern Railway, and from points on the latter railway to points on the former railway, and providing for a division of such through rates in proportion to the mileage of said shipments over each of said respective lines; said contract covering all points in Iowa on their respective lines. That said freight was received in pursuance of said agreement by said Sioux City & Pacific Company; it, under said contract, fixing a through rate therefor, and collecting the same, and thereafter making division thereof with its co-defendant pursuant to said contract. That said through joint rate on said shipments so charged to this plaintiff exceeds 80 per cent. of the sum of the two locals from the point of shipment to Missouri Valley, and from Missouri Valley to Council Bluffs. That during the entire period covered by the shipments referred to the defendants, on their through shipments to points on the line of the Chicago & Northwestern Railway east of Missouri Valley, charged, as a through joint rate, 80 per cent. of the two local tariffs from the point of shipment to Missouri Valley and from Missouri Valley to the point of destination. The defendants filed a motion to strike a part of this amendment. The demurrer and the motion to strike were overruled. A motion which had previously been made for the production of books and papers was, by agreement, sustained. Thereupon the defendant the Chicago & Northwestern Railway Company filed its answer, admitting that plaintiff shipped the hay claimed at and for the rates, charges, and prices stated in the petition. It admits that on joint

Blair v. Sioux City & P. Ry. Co

shipments over the Sioux City & Pacific Railway from Whiting to Missouri Valley, and thence east from the valley over the Chicago & Northwestern Railway, they charged 80 per cent. of the sum of the two locals, as alleged; admits the service of the written notice and demand; admits that plaintiffs' shipments were made on a through billing, by virtue of an agreement between the defendants, and that the rates charged were divided between them in pursuance of such agreement; admits that said joint through rate on said shipments so charged the plaintiff for a greater portion of the time exceeded 80 per cent. of the sum of the two locals; that from July 9, 1890, to April, 1893, the rate was less than 80 per cent. of the two locals; admits that during the entire period covered by the shipments of plaintiffs the defendants, on their through shipments to points on the line of the Chicago & Northwestern Railway east of Missouri Valley charged as a through joint rate 80 per cent. of the two local tariffs from the point of shipment to Missouri Valley and from Missouri Valley to the point of destination; avers that the rate charged plaintiff was less than the sum of the two local tariffs between the points heretofore mentioned, and that on July 9, 1890, the defendants put in operation a special joint tariff on baled hay of \$.0544, and all shipments of plaintiff after that date were made under such joint tariff; avers that during all of the time of the shipments made by the plaintiff, as alleged by him, the defendant had the lawful right to charge its local tariff from Missouri Valley to Council Bluffs on said shipment; and denies that the charge made and collected of the plaintiff was unlawful, or that it constituted discrimination, extortion, or an unreasonable charge; avers that from February, 1889, the distance tariff and classification made by the Iowa railroad commissioners have been in force over the defendant's lines, and that it has not made any charge in excess thereof, and that such rates were reasonable by force of the statutes of the state. Each plaintiff filed a further amendment to his petition, alleging that the tariff charged by the defendants on shipments to points on



## Blair v. Sioux City &amp; P. Ry. Co

their lines of road east of Missouri Valley was less than the sum of the two locals, and less than the tariff charged plaintiff on shipments of the same kind for like distances to Council Bluffs; that the amounts charged to plaintiff on such shipments referred to in the petition exceeded the tariff charged for like shipments at and about the same time, and for like distances, to points east of Missouri Valley, by the amount claimed as overcharge in the petition. The defendant filed a motion and a demurrer to the petition and amendments. The demurrer was, in effect, the same as the one before referred to. Prior answers filed were withdrawn, and the demurrer was overruled, whereupon the defendant refiled its answer. The defendant also answered in denial of the facts stated in the last amendment. Thereupon the plaintiff filed a further amendment as a substitute for a prior one, and in substantially the same language, which pleading was verified by one of the plaintiffs' attorneys, and there were annexed thereto interrogatories to be answered by the defendants. Thereafter defendant moved to strike said amendment, which motion was overruled, and the defendant was given 10 days in which to answer the interrogatories. Defendant then filed an answer to said amendment, denying the allegations therein contained. On the same day, defendant filed objections and exceptions to the interrogatories, because the same were not attached to plaintiff's original petition; because the statute did not require a corporation to answer interrogatories attached to pleadings; because all of them were immaterial, irrelevant, and incompetent. This motion was overruled, and the defendant allowed 10 days to answer interrogatories. After the expiration of the 10 days, plaintiff moved to strike the answer from the files because the defendant had failed and refused to conform to the order and rule of the court requiring them to produce books and papers, and because they had neglected and refused to answer the interrogatories. Thereafter the court granted the defendant leave to answer the interrogatories without prejudice to plaintiff's motion to strike, whereupon the defendant filed its answers

## Blair v. Sioux City &amp; P. Ry. Co

to said interrogatories. Nearly all of the answers were in the following language: "I do not know; and I further state that I know of no officer of the defendant corporation that has actual, personal knowledge of the facts called for in this interrogatory." These answers were sworn to by the general manager of the defendant, who says that "the information required by the said interrogatories is not within my actual, personal knowledge, nor the actual, personal knowledge of any officer of this answering defendant corporation." Thereupon the plaintiff moved to strike said answers, because they were a manifest and palpable evasion and disregard of the order of the court; because the answers are shown to be made by a person having no knowledge from which to make answers; said answers do not pretend to give the information and knowledge of the defendant with reference to the matters that were the subject-matter of the interrogatories. This motion was sustained, and the defendant ordered to make full and candid answers to said interrogatories before August 27, 1895. The defendant then filed an answer to said interrogatories, averring that its answer theretofore filed were full, candid, and true, and reiterated the same as its answer. Another motion to strike this last answer was filed by plaintiff because the answer was immaterial, irrelevant, and flippant. Thereafter the court entered an order striking the amended answer to interrogatories from the files, and also ordered that, as defendant had failed to file full and candid answers to the interrogatories, as required by the court, in default thereof the answer filed in the case by the defendant should be quashed, and stricken from the files. Thereafter defendant was adjudged to be in default, and on the pleadings and proof adduced by the plaintiff a judgment was entered in each case against the defendant, which was ordered to draw 6 per cent. interest from its date. The defendant excepted to the judgment, and to all rulings made against it.

No claim is made that the petition, as amended, states a cause of action under the common law, and it must therefore

*Blair v. Sioux City & P. Ry. Co*

be tried by the statutes of this state relating to extortion and discrimination. When the action was commenced, the case of *State v. Sioux City & St. P. Ry. Co.*, 90 Iowa, 594, 58 N. W. 1060, had not been determined, and the plaintiffs evidently sought to recover for violation of the joint rates fixed by the railway commission. Many of the amendments to the petitions were filed after that opinion was announced, and from them it appears that plaintiffs sought to recover for unreasonable and extortionate exactions, and by reason of the fact that the defendants had voluntarily established joint rates over their lines of road, and had charged plaintiffs a rate in excess of that rate on like shipments at the same time which were made to other points for a like distance over their lines of road. In the case last above referred to it was expressly held that the joint rates established by the railway commission were invalid because no notice was given to the companies in interest, as required by statute. It is also said in that case that there is nothing in the act of the 22d general assembly touching joint rates except the provision as to filing and publishing the schedule adopted by the roads. This language had reference solely to the powers of the railway commission to fix rates, and not as to the effect to be given to joint rates voluntarily established. Counsel for appellees concede that chapter 77 of the Acts of the 17th General Assembly does not apply to joint rates. The questions that we have for solution, then, are: Is there any law of this state prohibiting extortion and discrimination when joint rates are voluntarily established between two or more railroads? Is it lawful for railway corporations that have voluntarily established joint rates to charge more for a shipment made over one of the lines to a point west on another than it does for a like contemporaneous shipment from the initial point to a point east of the junction with that other? To determine these questions, resort must be had to the railway legislation of the state. Chapter 77, § 12, of the Acts of the 17th General Assembly provides that "no railroad company shall charge, demand or receive from any

## Blair v. Sioux City &amp; P. Ry. Co

person, company or corporation an unreasonable price for the transportation of \* \* \* property. \* \* \*” The next section of the same act provided as a punishment for the violation of the provisions of the act that such violation should forfeit to the party aggrieved three times the actual damages sustained or overcharges paid, with costs and attorney’s fees. By Acts 22d Gen. Assem. c. 28, which in terms applies to all cases of the transportation of property by railroad within the state, it is provided that: “All charges made for any service rendered \* \* \* in the transportation of \* \* \* property in this state \* \* \* shall be reasonable and just; \* \* \* and every unjust and unreasonable charge for such service is prohibited and declared unlawful.” “If any common carrier subject to the provisions of this act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered \* \* \* in the transportation of \* \* \* property subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons doing \* \* \* a like and contemporaneous service in the transportation of a like kind of traffic, such common carrier shall be deemed guilty of an unjust discrimination. \* \* \*” *Id.* § 3. Section 4 of the same act prohibits the giving of any preference or advantage to any particular person or locality in any respect whatsoever, and likewise prohibits the subjecting of any person or locality to any prejudice or disadvantage in any respect. In section 5 of the same act it is provided: “And said common carrier shall charge no more for transporting freight to or from any point on its railroad than a fair and just rate as compared with the price it charges for the same kind of freight transportation to or from any other point.” By section 9 of the same act the violations of the provisions of the chapter are made to subject the offending carrier to three times the amount of the damages sustained, with costs and attorney’s fees. It is contended that neither

Blair v. Sioux City & P. Ry. Co

of these acts applies to joint rates. We have held that they do not authorize the railway commission to fix them, and it may be conceded for the purposes of the case that they do not apply to joint rates established by voluntary agreement. But the 23d general assembly passed an act known as "chapter 17 of the Acts of 1890," the first section of which provides: "That chapter 28 of the Acts of the 22d General Assembly be and the same are hereby amended as follows: That said chapter 28 of the Acts of the 22d General Assembly shall not be construed to prohibit the making of rates by two or more railroad companies for the transportation of property over two or more of their respective lines of railroad within this state, and a less charge by each of said railroad companies for its portion of such joint shipment than it charges for a shipment for the same distance wholly over its own line within the state, shall not be considered a violation of said chapter 28 of the Acts of the 22d General Assembly and shall not render such railroad company liable to any of the penalties of said act; but the provisions of this section shall not be construed to permit railway companies, establishing joint rates, to make by such joint rates any unjust discrimination between the different shipping points or stations upon their respective lines between which joint rates are established, and any such unjust discrimination shall be punished in the manner and by the penalties provided by chapter 28 of the Acts of the 22d General Assembly." That section clearly covers joint rates, for it says, in effect, that railway companies establishing joint rates shall not make any unjust discrimination between the different shipping points or stations upon their respective lines between which joint rates are established. Section 5 of the same act also provides that every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in the state is prohibited, and made unlawful, and that each and every one of the companies making such unreasonable and unlaw-

Joint-Freight  
Rates-Extortion  
and Discrimina-  
tion-Statutes.

## Blair v. Sioux City &amp; P. Ry. Co

ful charge shall be punished as provided in chapter 28 of the Acts of the 22d General Assembly. The petition recites that defendants established joint rates between all stations on their respective lines in the state of Iowa; that they unjustly discriminated between the different points on their lines, to plaintiffs' damage; and that the rates charged plaintiffs were unjust, and unreasonable, and extortionate. The other allegations as to the particular points may be treated as statements of fact making a *prima facie* case of discrimination, for it was competent for plaintiffs to prove by other evidence that the charges and exactions paid by them were unreasonable, extortionate, and discriminatory. And, as the evidence on which the court relied is not before us, we cannot say that the judgments were improperly rendered. In the face of these allegations the petitions were not vulnerable to demurrer. *Cook v. Railway Co.*, 81 Iowa 551, 46 N. W. 1080, squarely decides this point. It is there said: "It is strenuously contended by counsel for appellant that it is not charged in the petition as a substantial fact that the rate charged the plaintiffs was unreasonable. It is distinctly averred that the rate charged the plaintiffs was unreasonable, and is and was an unjust discrimination. This appears to us to be a sufficient answer to the argument of counsel to the effect that the action is founded solely upon the fact of mere difference in rates." Again, when two or more companies voluntarily enter into an agreement for joint rates, which agreement covers all stations upon the line in any given state, they virtually create a new and independent line, and, in our opinion, become subject to the law preventing unjust discrimination and unreasonable exaction. See *Railway Co. v. Osborne*, 10 U. S. App. 430, 3 C. C. A. 347, 52 Fed. 912; *Parsons v. Railway Co.*, 167 U. S. 453, 17 Sup. Ct. 887; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 54 Am. & Eng. R. Cas, 365. 17 Sup. Ct. 896. Whether they then come within the prohibitions of the Acts of the 22d General Assembly need not be

Same-Same-  
Forming New  
Line.

## Blair v. Sioux City &amp; P. Ry. Co

determined, for section 1 of the Acts of the 23d General Assembly provides that they shall not make any unjust discrimination between the different shipping points or stations upon their respective lines between which joint rates are established. If, as defendants contend, joint rates had been established between Whiting and Blencoe and Council Bluffs, and between no other points, there would be much force in their argument that such rates could not be measured by any other charges. But, as the petition alleges that joint rates were established for all stations upon either line, the rates and charges for the same class of goods over like distances of road may be considered, not only in arriving at the solution of the question of unjust discrimination, but also in determining whether the rate charged was unreasonable. It is distinctly averred in the petition that the defendants charged for like goods over the same distance of road less than was charged the plaintiffs. In view of the other allegations of the petition this made out a *prima facie* case. 1 Wood, R. R. § 198.

Consideration of the various acts of the legislature clearly indicates that, when joint rates are established between all points on two or more lines of road, extortion and discrimination are prohibited. Such are the express ~~Same—Same—~~ terms of the statute, and that this was the ~~Same.~~ intent of the legislature there can be no doubt.

But it is said that section 24 of the Acts of the 22d General Assembly defines discrimination, and that the case at bar does not come within that definition. It is true that the section referred to does say that to collect or charge more for the transportation of a like quantity of freight of the same class, being transported in the same direction over any portion of the same railroad of equal distance, from one person than from another, shall be deemed *prima facie* evidence of unjust discrimination in freight rates. But the same section also says that this shall not be construed to exclude other evidence tending to show any unjust discrimination. Section 3 of that act also provides that if any common carrier

## Blair v. Sioux City &amp; P. Ry. Co

charge, collect, or receive from any person a greater compensation for service rendered than it charges, collects, or receives from any other person for doing a like and contemporaneous service, such carrier shall be guilty of unjust discrimination; and the latter part of section 5 reads: "And said common carrier shall charge no more for transporting freight to or from any point of its railroad than a just and fair rate as compared with the price it charges for the same kind of freight transportation to or from any other point." So that, if we look to the Acts of the 22d General Assembly to determine what constitutes extortion or unjust discrimination, we find that the facts stated in the petition clearly bring the case within the definitions there given. If it be true, however, as claimed by appellants, that the facts pleaded do not make out a *prima facie* case because of the fact that in one case the charge was transporting freight to a point west of Missouri Valley, while in the other it was for transporting like goods to a point east of that place, still a cause of action for unreasonable and extortionate charge and for unjust discrimination is stated in the pleading, and the demurrers were properly overruled.

The constitutionality of the Acts of the 23d General Assembly is assailed. Whatever may be the views of the individual members of this court as to some of the sections of that act, we all agreed that under the interpretation herein given section 1 of that act is not vulnerable to attack because of anything in our fundamental law. The other sections of the act are not involved, and we have no occasion to pass upon their validity. Nor are we called upon to say whether or not companies voluntarily establishing joint rates are bound, under all circumstances, to charge the same rate for carrying the same kind of freight over one part of the road that they do over another. Whether or not such discrimination would be unjust we have no occasion to determine.

2. Complaint is made of the ruling requiring the defendant to answer the interrogatories attached to plaintiff's amended



## Blair v. Sioux City &amp; P. Ry. Co

petition. Since the trial of the case in the court below, the legislature has passed an act requiring corporations to answer such interrogatories. The majority of the court are of opinion, however, that such right existed before the adoption of the new Code. The writer and MR. JUSTICE LADD do not agree to this conclusion. But, as the matter has now been covered by statute, there is no need to give the reasons which lead to these different conclusions. In the opinion of the majority, there was no error in requiring the defendant to answer the interrogatories.

3. It is said that the interrogatories were fully answered. In the statement of the case we set out the answers. The lower court rightfully struck them out. They showed on their face that no attempt had been made in good faith to answer the interrogatories fairly and candidly. The answers showed a studied attempt to avoid complying with the law by entering a disclaimer on the part of the answering officers as to any personal knowledge as to the matters inquired about. Counsel for appellants admit in argument (and the fact would be apparent, if not admitted) that the information sought by the interrogatories was in the possession of the defendant corporation, was shown by its books and papers in the custody of the officers, and, for all that appears, easily and speedily accessible to the answering officers. Studiously avoiding all these sources of information in their own possession as officers of the defendant, they answer that they have no personal knowledge as to the matters inquired about, and they know of no officer of the defendant having such personal knowledge. Under the circumstances, with the means of knowledge in their possession, these answers presented a very clear case of trifling with the court. In *Sloane v. Railway Co.* (Cal.), 44 Pac. 320, 4 Am. & Eng. R. Cas., N. S., 182, it is said in the syllabus, which is sustained by the decision: "A corporation cannot deny for want of sufficient information and

Blair v. Sioux City & P. Ry. Co

belief, if the matters alleged are presumptively within the knowledge of any of its officers, though the officer verifying the answers is himself without any information or belief on the subject. The court was exceedingly lenient, and more than once extended the time of the defendants to answer the interrogatories. His action in striking these answers and the answers in the case was in all respects proper."

4. Counsel contend that the interrogatories were immaterial, and that as the affidavit attached thereto was made by an attorney, and, as they were not annexed to the original petition, the defendants were not required to answer them. Some of the interrogatories were certainly material, and, as the objection goes to the whole, and not to particular ones, the first objection is without merit. The point **Same—Same.** that the affidavit was made by an attorney does

~~not~~ seem to have been made in the trial court, and cannot be considered. Interrogatories may certainly be attached to an amendment to the petition, and it is within the sound discretion of the court to permit amendments to be made at any time during the trial. On rehearing it is for the first time suggested in the reply argument that, as the amendment to the petition to which the interrogatories were attached stated no new cause of action, it should not be considered, and that the defendant should, for that reason, be absolved from answering the interrogatories thereto attached. Reliance is placed on *Theis v. Railway Co.*, 107 Iowa 522, 78 N. W. 199. On rehearing we do not consider points not raised at the original submission. This alone is a **Rehearing.** sufficient answer to defendant's last contention.

But it may be observed that the facts of the case are entirely different from those appearing in the *Theis Case*. There the case was ready for trial, and the plaintiff did no more than refile his petition with interrogatories attached. Here the amendment to the petition recited some material facts not found in the other pleadings, and, in addition to

## Blair v. Sioux City &amp; P. Ry. Co

that fact, this amendment was verified, while none of the previous pleadings were. A motion to strike this amendment was filed, but was overruled. While error is assigned on this ruling, it was not argued on the original submission. Defendants then answered the substituted petition, and made no complaint as to the time allowed them for answer. The interrogatories were filed on January 9th, and defendants were given until June 20th to answer, and the answers were not stricken until September of the same year. As plaintiff had the right to attach the interrogatories to their amendments to their petition, and as the court, in its discretion, held that such amendments were permissible, there was no error of which defendants may justly complain. *Wilson v. Preston*, 15 Iowa 246; *Martin v. Shannon*, 101 Iowa 620, 70 N. W. 720; *Hintrager v. Richter*, 85 Iowa 222, 52 N. W. 188; *Guyer v. Manufacturing Co.*, 97 Iowa 132, 66 N. W. 83.

5. The court allowed interest on the treble damages claimed from the time the alleged cause of action accrued to the date of the judgment. We think this was error. This

Penal Statutes—  
Damages—Inter-  
est.

statute is penal in character, and therefore liability should be limited to the amount fixed

by the statute as compensation for damages sustained, to wit, the treble damages, attorney's fees, and costs. The following decisions under other statutes are applicable: *Brentner v. Railroad Co.*, 68 Iowa 530, 19 Am. & Eng. R. Cas. 448, 23 N. W. 245, and 27 N. W. 605; *Herriman v. Railroad Co.*, 57 Iowa 187, 9 Am. & Eng. R. Cas. 339, 9 N. W. 378, and 10 N. W. 340. Plaintiffs, how-

Remittitur.

ever, having filed in this court an offer to remit the excessive amount allowed, it is ordered that judgment in each case be reduced in the following amounts: In *Blair v. These Defendants* in the sum of \$86.75, in *Hollaway v. These Defendants* in the sum of \$481.74, in *Brown v. These Defendants* in the sum of \$97.80, in *Macoy v. These Defendants* in the sum of \$185.70. The death of A. A.

## Note

Brown, a plaintiff, is suggested, and John R. Brown, his administrator, is substituted as a party plaintiff. The judgment of the court below, as thus modified, in each case will stand affirmed, including the allowance therein made of attorney's fees, and said modified judgments will draw 6 per cent. interest from the date they were rendered in the district court. Affirmed.

LADD and DREMER, JJ., dissent.

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NOTE.

**Discrimination in Freight Rates—When New "Line" is Formed.**—Two carriers may use the same "road" but each has a separate "line." One railroad company may lease trackage rights to another; but the joint use of the same track does not create the same "line," so as to compel either company to graduate its tariff by that of the other. There must be "common arrangement" between connecting companies, such as the making of a joint tariff, before a "new line" can be formed; and the "line" so formed under the joint tariff of the connecting companies is one which is separate and independent from that of either of the connecting companies. *Interstate C. C. v. Cinc. N. O. & T. P. R. Co.*, (C. C. N. D. Ga.), 56 Fed. Rep. 925, 4 Int. Com. Rep. 332, 54 Am. & Eng. R. Cas. 365.

When a railroad company whose line is situated entirely within a state, enters into the carriage of foreign freight, by agreeing to receive goods under through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, and accordingly is amenable to the Interstate Commerce Act. *Cinc. N. O. & T. P. R. Co. v. Interstate C. C.*, 162 U. S. 184, 4 Am. & Eng. R. Cas., N. S., 223. See also *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 Int. Com. Rep. 571; *Chicago & N. W. R. Co. v. Osborne*, 53 Am. & Eng. R. Cas. 18, 52 Fed. Rep. 912, 4 Int. Com. Rep. 257.

Dixon v. Central of Georgia Ry. Co

DIXON *et al.*

v.

CENTRAL OF GEORGIA RY. CO.

*(Supreme Court of Georgia, March 2, 1900.)*

**Charges—Distinction between Transportation Service and Transfer Service.**—The test of distinction between "transportation" service, relatively to loaded freight cars, for which a railway company can lawfully charge tonnage rates, and "switching" or "transfer" service, for which it is restricted to a fixed charge per car, is not whether the movement of the cars involves the use of a portion of the company's main line or that of another; for there may be a transportation service over one or more spur tracks of the same company, if the contract of affreightment requires no movement over other tracks or lines of railway, whereas a switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned or are to be earned.

**Same—Same—Parol Evidence.**—Parol evidence is admissible to explain the meaning of the terms "transportation," "switching," and "transfer," as applied to railroad operation.

**Reduced Rates—Right of Contractor to Benefit of Municipal Contract.**—A contract between a city and a railway company for reduced freight rates upon goods transported by the company for the municipality does not inure to the benefit of one under contract with the city to deliver to it at a fixed price supplies f. o. b. at the point of delivery.

**Same—Same.**—Though a person who had contracted with a city to furnish it with coal for use in running a system of waterworks became the head of the water commission of such city, he could not, because of his official position as such, avail himself of the terms of a transportation contract between the city and a railway company, whereby the former had secured reduced freight charges upon goods or supplies hauled for its benefit.

**When Relation of Shipper and Carrier Begins.\***—The relation of shipper and carrier does not begin between the owner of goods and a railway company, though the former may have delivered the goods

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\*See notes at end of case.

Dixon v. Central of Georgia Ry. Co

to the latter, if after such delivery anything required, either by law or the contract, remains to be done by the shipper, and in such case the rights and liability of the company are those only of a warehouseman.

**Same—Goods on Spur Track.**—Where goods to be shipped are situated upon a spur track of a railway company, and the owner has no track scales, thus rendering it necessary to move the loaded cars to the company's depot for the purpose of weighing the same, so as to ascertain the proper amount of freight charges, the delivery of such cars will be treated as having been made to the company at such depot.

**Delivery—Railroad as Warehouseman—Lien for Storage Charges.**—When such a delivery is in fact made, and the shipper refuses, on demand, to pay the proper freight charges, and the goods are left in the custody of the company, it has a lien upon such goods for proper storage charges, whether they be left in the cars or removed into a warehouse.

**Same—Same—Same—Possession of Goods.**—Where several cars are left in the custody of a railway company under such conditions as those just indicated, the company may retain possession of the goods in all of them until its just charges are paid.

**Case at Bar.**—While the motion for a new trial contained a large number of grounds, the principles of law above announced are controlling in this case, and, upon the merits, the evidence demanded the verdict.

(Syllabus by the Court.)

**ERROR** by defendants from Chatham county superior court.  
*Affirmed.*

*Saussy & Saussy*, for plaintiffs in error.

*Lawton & Cunningham*, for defendants in error.

**LEWIS, J.** On the 1st day of August, 1898, the Central of Georgia Railway Company instituted, under section 2816 of the Civil Code, proceedings to foreclose a lien on four cars of coal received by it from the defendants, C.

Case Stated.

**H. Dixon & Co., Agents**, on June 7, 1898. It was claimed in the affidavit of foreclosure that this coal was received by the company at its place of business in the city of Savannah, to be shipped to the waterworks in said city, for which the defendants refused to pay the regular rates of 17½ cents per ton demanded by the company, and since the

## Dixon v. Central of Georgia Ry. Co

date of their receipt the four cars of coal have been in its possession, as depositary for hire, in its yard in the city of Savannah. The proceedings were for the purpose of foreclosing a lien claimed by the company as a depositary for hire. It was further urged in the affidavit of foreclosure that these cars of coal were received by the company with the understanding that Dixon & Co., Agents, would prepay any freight charges thereon, which they refused to do. *Fi. fa.* was issued upon this affidavit of foreclosure, and levied upon the coal. To this proceeding C. H. Dixon, trading under the name of C. H. Dixon & Co., Agents, filed an affidavit of illegality on the several grounds, embracing substantially the following as defenses: (1) It did not appear from plaintiff's affidavit it had completed its contract of shipment, so as to entitle it to any lien for freight charges. (2) The place of shipment was the waterworks, and it did not appear that there was any delivery of the freight tendered at the place of destination. (3) The charge in the proceedings for foreclosure was for storage, while the bill of particulars attached thereto was for demurrage, for which charge there is no lien prescribed under the statute. (4) The company had no lien on the property levied upon. (5) The amount set forth in the affidavit of foreclosure or no part thereof was due. (6) Plaintiff received the cars from the place of business of defendant on River street under a contract to deliver the same, as per consignment, to the city of Savannah, at the wharf of said railroad, at the end of River street, in said city; and, before any charges could accrue against the shipment, defendant tendered to plaintiff the cost of trackage along River street, the usual and customary charge for such service, and a charge regulated under the ordinances of the city of Savannah, to wit, one dollar per car; that the company operates the line on River street for purposes of transfers, said track being no part of the main stem of the railway. This defendant, in behalf of the city of Savannah, and under authority of the chairman of the waterworks commission, which has control of the Savannah

Dixon v. Central of Georgia Ry. Co

waterworks, accepted the freight at the wharf of plaintiff, and ordered the freight transferred to the Savannah waterworks, and tendered plaintiff the sum of one dollar per car, being the rate for such transfer. Plaintiff refused the tender, and retained possession of the goods unlawfully. It is further claimed in the affidavit of illegality that the rules of the railroad commission of Georgia provided that the failure of a railroad company to deliver freight entitles the shipper to recover damages at the rate of one dollar per car, and this was pleaded as an offset. It was the duty of the plaintiff to deliver the freight to the Florida, Central & Peninsular Railroad Company, with which company it had a contract concerning transportation of freight for said waterworks, whereby the last-named company was to haul all freight to said point without charge, inasmuch as the spur track leading from the main line of the plaintiff to the waterworks was used in part by the Florida Central & Peninsular Railroad Company as a means of approach to the depot in the city of Savannah. It also alleged that the waterworks were not situate on the main line of plaintiff's railway, nor upon any connecting road, so as to enable plaintiff to charge regular freight rates for transportation; but the waterworks were situate on a spur track built by the city of Savannah, and by it turned over to plaintiff's predecessor upon express condition that all freight consigned to said city at the waterworks should be hauled and delivered at the rate of one dollar per loaded car as trackage; and the waterworks not being upon the main line of plaintiff, nor upon the line of any other railroad or station, or public place for delivery of freight, and being within three miles of plaintiff's wharf and the wharf of defendant, said waterworks stand upon the same footing as warehouses and factories, and plaintiff, upon completion of its contract of affreightment, was not entitled to charge any more than the rate allowed by law for trackage.

It substantially appears from the evidence in the record that C. H. Dixon & Co., Agents, were coal merchants,



## Dixon v. Central of Georgia Ry. Co

whose place of business was on River street, adjacent to the River street track of the Central Railway. Dixon & Co. had a contract with the water commissioners of the city of Savannah to deliver coal f. o. b. cars at the waterworks, which was about two miles out of the city, and connected with the terminals of the Central by a track known as the "Waterworks Track." This last track was also owned by the Central, which laid the same on the land belonging to the city, and, upon completion of the waterworks, the track and roadway was ceded by the city to the Central, and a contract was entered into between them "that the trackage charge to the city shall not exceed the sum of one dollar per loaded car for all cars received from, or delivered to, the said city on said spur track." It seems this track was under lease to the Florida, Central & Peninsular Railroad Company, being the track on which its railroad entered the city, but it was agreed in the lease that railroad would switch the cars of the Central of Georgia "to and from the waterworks, and such other industries as may be located thereon, oversaid track, free of compensation, and as promptly as their own similar service is performed, and when so engaged the agents and servants of the Florida Railroad shall be considered as servants of the Central Railroad." It would seem, therefore, as to this case, the waterworks track may be treated as substantially the track of the Central of Georgia Railway.

C. H. Dixon & Co. was a firm composed only of C. H. Dixon, who became insolvent a few months before the time of this shipment. Pending the incorporation of a company which was to be known as the "C. H. Dixon Company," the incorporators of which were the said C. H. Dixon and his two brothers, M. W. and James M. Dixon, the business formerly conducted by the defunct firm passed into the hands of C. H. Dixon & Co., Agents, who assumed the contract with the waterworks commissioners to deliver coal free on board cars at the waterworks. C. H. Dixon ran the business of Dixon & Co., Agents, whereof his brother, J. M. Dixon,

## Dixon v. Central of Georgia Ry. Co

was the principal. J. M. Dixon was surety for the faithful performance of the contract of Dixon & Co. with the waterworks commission, and he was also chairman of the waterworks commission, a body created by the legislature. See Acts 1895, p. 300. That act provided that an oath of office be taken by each member of the commission, which was duly taken by J. M. Dixon, as follows: "I swear that I will not be concerned or interested, pecuniarily, in any way, \* \* \* in any contract for the purchase of property or supplies for said waterworks, while a member of said board." C. H. Dixon & Co., Agents, were not on the credit list of the Central of Georgia Railway, and the prepayment of freight was always exacted. The rate which the Central had uniformly charged for shipments of coal from any point on the River street track to the waterworks was  $17\frac{1}{2}$  cents a ton. The railroad commission rate for a distance of five miles and under was 35 cents per ton. The distance from Dixon's wharf to the waterworks is 2.64 miles. In 1896, C. H. Dixon and H. M. Comer, who was then receiver of the Central, by contract, made the rate of freight between these points at  $17\frac{1}{2}$  cents a ton, which seems to be half of what the law permitted the Central to charge. For an ordinary transfer or switching service on the River street track the railroad's charge was uniformly one dollar per car.

It appears from the evidence that these rates were uniformly charged and paid by Dixon & Co., Agents, who had shipped a number of cars under their contract with the Central, and that they paid these charges without any objection whatever up to the time of the shipment in question. Dixon & Co., Agents, had no track scales at their wharf, and the only way in which the amount of freight could be determined, if the tonnage rate applied, was to weigh the cars on the track scales in the Central Railway yards. The four cars in question were, on this account, loaded with coal on the River street track, adjacent to Dixon's place of business, for the purpose of being shipped to the waterworks. The Central

## Dixon v. Central of Georgia Ry. Co

took the cars up to its yard, weighed them, and sent the weights to Dixon & Co., Agents, with a bill for \$17.20, freight charges, that being the amount at the rate of 17 ½ cents per ton, and the shipper, instead of sending that amount, sent the Central a check of \$8, or \$2 per car. This the Central refused to accept. It seems the shipper thereupon complained to the city that the Central had violated its contract with the city, and would not transfer the cars from the wharf to the waterworks for one dollar per car. The city declined to grant the relief sought by the shipper, and replied that, his contract being to deliver coal f. o. b. cars at the waterworks, it was a matter of indifference to the city how much freight the shipper paid.

It appears from the evidence that J. M. Dixon was the principal actor in this matter for C. H. Dixon & Co., Agents, and that he was also chairman of the water commission. A letter was written by them to the agent of the Central at its wharf, consigning the cars to the city of Savannah, for which they made a tender of one dollar per car for River street trackage. J. M. Dixon, as chairman of the commission, also wrote a letter to the agent of the Central, instructing him to transfer to the waterworks, in accordance with the agreement between the city and the railway, at one dollar per car, the coal which had been consigned to the city at the Central wharves; thus making the rate from Dixon's wharf to the waterworks only two dollars per car. It further appears from the record that J. M. Dixon did not consult any member of the board of the water commission about writing the letter, and that the money he tendered came out of his own pocket. The shipper having declined to pay the rate demanded, the cars remained where they were when the difference arose between the parties, and the railway assessed charges for storage, and foreclosed its lien as a depository for hire.

1. The vital question in this case, and one upon which its determination mainly depends, is whether or not the service for which the railway was charging the shipper of

Dixon v. Central of Georgia Ry. Co

was "transportation" service or "transfer" or this coal "switching" service. It appears from the record that an appeal was made by the plaintiff in error to the railroad commission, by which proceeding it was sought to get the railroad commission to enforce in this matter its rule No. 25 in language as follows: "A charge of no more than two dollars per car will be allowed for switching or transferring a car from any point on any road to any connecting road or warehouse within a space of three miles from starting point, without regard to weight or contents." From the facts in the record it appears that this rule manifestly applies to what is known as "switching" or "transfer" service, and it was claimed by counsel for plaintiff in error that it was applicable to this case, where it was purely a transfer service, as the shipment of the goods was confined to what is known as "spur tracks" of the railroad. On the other hand, it was contended by counsel for defendant in error that that rule had no application whatever to this service, for transfer or switching service only relates to the removal of cars over spur tracks after they have reached the terminal point of some railroad line, and, without being unloaded, are transferred on a spur track usually to the place of business of the consignee. It is therefore contended that switching service applies only in cases where there necessarily preceded or succeeded such service the payment of freight for transportation over some line of railway. From this contention it would follow, for example, that if Dixon & Co. had ordered freight over the Central to be shipped to Savannah from Macon, Ga., they would be liable for regular rates of transportation from that point to the railway terminal at Savannah, and the Central, in shipping the freight from its depot over the spur track to Dixon & Co.'s place of business, would simply be entitled to the rates fixed for such transfer service; or, if Dixon & Co. desired the Central to transport freight from their place of business in Savannah to Macon, and the Central transported the goods over its spur track from the shipper's place of business to its depot,

Charges—Dis-  
tinction between  
Transportation  
Service and  
Transfer Service.

*Dixon v. Central of Georgia Ry. Co*

it could only charge additional, for this part of the transportation, simply the switching service rate. We think the case is quite different when the shipment of freight is entirely confined to such a spur track. The uncontradicted evidence shows that the necessary expenses for such a shipment could not be met by payment of the small rate prescribed for a transfer or switching service, and these small rates are chargeable only in cases where revenue is derived for transporting the freight over a railway which must either precede or follow the service rendered on the spur track. In this case the contract of carriage involved a transportation from Dixon's wharf to the waterworks. That constituted the entire service, and the fact that that entire service was rendered on spur tracks of a railway company we do not think prevents it from being transportation, pure and simple.

It appears from the record that the shipper in this case appealed to the railroad commission to enforce its rule No. 25, above quoted, and that, after hearing the application, the commission decided that the shipper was not entitled to the relief sought, and that the service rendered by the Central in the case was really for transportation, and hence it had the right to make the charge in accordance with the rule of the railroad commission, which allowed for the transportation of freight over routes under five miles a rate of 35 cents per ton. In the present case the Central only charged half this sum. It does seem that this decision of the railroad commission in this identical case should operate as conclusive evidence of the reasonableness and legality of the charge exacted by the Central against the shipper. Section 2189 of the Civil Code provides: "The commissioners shall make reasonable and just rates of freight, and \* \* \* shall make reasonable and just rules and regulations, to be observed by all railroad companies doing business in this state, as to charges at any and all points for the necessary handling and delivering of freights." And, under section 2190 of the Civil Code, it is provided that in suits brought against such corporations the commission's schedules of

## Dixon v. Central of Georgia Ry. Co

rates shall be deemed and taken in all the courts of this state as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for transportation. Even if the construction the commission has placed upon its own rule is not conclusive upon the parties, it certainly should receive great weight, under the law, with the courts. But, in addition to this, a quantity of evidence was introduced in behalf of the Central Railway by witnesses expert in railroad business, and familiar with the meaning of certain terms used in connection with such business, who defined what was meant by transportation and switching service, and distinguished the difference exactly in accord with the contention of counsel for defendant in error in this case. We therefore think, in the light of all the evidence in the record, that the service undertaken by the Central in this case was purely transportation service, and that the rates with reference to transfer or switching cars over spur tracks had no application whatever.

2. Error is assigned in the motion for a new trial upon the admission of parol evidence for the purpose of explaining the meaning of the terms "transportation," "transfer," and "switching," as applied to railroad corporations. This question involves the construction <sup>Same—Same—</sup> ~~Parol Evidence.~~ of words used in connection with a particular subject-matter. Experts in the business were offered as witnesses to testify as to their common acceptance and usage when applied to the operation of railroad companies. We think the Political Code (section 4 [1]) settles the question. It declares: "The ordinary signification shall be applied to all words, except words of art, or connected with a particular trade or subject-matter, when they shall have the signification attached to them by experts in such trade, or with reference to such subject-matter." See, also, Civ. Code, § 3675 (2), where it is declared: "Words generally bear their usual and common signification; but technical words, or words of art, are used in a particular trade or business, will be construed generally, to be used in reference to this peculiar mean-

## Dixon v. Central of Georgia Ry. Co

ing. The local usage or understanding of a word may be proved in order to arrive at the meaning intended by the parties." See, also, 1 Greenl. Ev. 280, where the principle of allowing parol evidence in such cases is clearly recognized.

3, 4. It was further insisted in behalf of plaintiff in error that the contract between the city of Savannah and the Central for reduced freight rates upon goods transported by the company for the municipality was binding upon the former in this case, and that it could not charge for service of this transportation from the depot to the waterworks any more than the price stipulated in that contract of one dollar per car. It is manifest from the evidence in the record that this contract between the Central and the city had nothing whatever to do with the contract between the parties to this case. The contract made with the city had direct reference only to such goods as were consigned to the city, and for the payment of which the municipality itself was liable. In this case the shippers were under contract with the water commission of

**Reduced Rates—  
Right of Con-  
tractor to Benefit  
of Municipal  
Contract.**

**Same—Same.**

Savannah to deliver to it coal f. o. b. the cars at the waterworks. It is true that the active manager of the business of Dixon & Co., J. M. Dixon, was also chairman of the water commission. He adopted the scheme of writing a letter to the agent of the Central instructing him to transfer to the waterworks the coal which had been consigned to the city, but he had no authority whatever for giving such direction. It was certainly never authorized by the city itself, through its officials, nor was it authorized by any resolution or other action taken by the board of water commissioners. On the contrary, it appears that he intended to make the payment himself out of his own pocket, and that it was in no wise a charge upon the city. When he made his appeal to the municipal authorities of the city, they gave the same construction of this contract as was adopted by the Central, and declined to grant any relief whatever.

Dixon v. Central of Georgia Ry. Co

5, 6. It was further contended by counsel for plaintiff in error that the railway company in this case occupied the position of a common carrier; that it had failed to comply with its obligations to transport the goods to their destination; that it never occupied the position of a warehouseman, and therefore had no lien upon the property for storage. It was further contended that the duty devolved upon the company, unless it intended to transport the property to its destination, to reship it to the consignor, and that the company had no right to hold the same, and thus accumulate against the shipper charges for storage. Under the facts of this case, we do not think there is any question but that the company occupied the position of a warehouseman. It is true the goods had been transferred from the place of business of the shipper to the company's yards, but that was absolutely necessary, in order to determine what would be a proper charge for transportation. There was no means of weighing the cars at the shipper's place of business, where they were loaded. This weight was absolutely necessary in order to determine the amount of freight, and hence they had to be transferred to the company's yards for this purpose. We think, therefore, the delivery of the cars should be treated as having been made to the company at its depot. Under the contract between the carrier and shipper in this case, a prepayment of the freight was required before any obligation rested upon the carrier to transport the goods to their destination. This the shipper wrongfully refused to pay, and, clearly, the duties of the company as a common carrier did not begin, although the delivery of the goods for shipment had been made, as long as anything remained to be done by the shipper himself. In 5 Am. & Eng. Enc. Law (2d Ed.) p. 261, that author says: "The rule, broadly stated, is that if, after the delivery of the goods for shipment, anything remains to be done by the shipper, the liability of the carrier as insurer does not attach, and it is responsible only as a warehouseman." In the case

When Relation of  
Shipper and Car-  
rier Begins.



## Dixon v. Central of Georgia Ry. Co

of *Barron v. Eldredge*, 100 Mass. 458, COLT, J., in discussing this subject, says: "The responsibility of a common carrier for goods intrusted to him commences when there has been a complete delivery for the purpose of immediate transportation. \* \* \* The delivery must be for immediate transportation, and, of course, it cannot be complete if anything remains to be done by the shipper before the goods can be sent on their way." The same principle is announced in *Hutch. Carr.* § 63. It is therein stated that no one can be chargeable as a carrier, but merely as a warehouseman, until the shipper has complied with every duty upon him which it was necessary for him to discharge before shipment, and the author thus illustrates: "As where the goods are deposited without instructions as to their place of destination, either by marks or otherwise, or to await orders, or until the charges for the transportation are paid, if that is required by the carrier; or if anything remains to be done, or any expense to be incurred, to put them in a condition to bear transportation." While the company, therefore, retained this property on board its cars at its depot, on account of the failure of the shipper to comply with the conditions precedent to its shipment, it occupied, as to him, the position of a warehouseman. There is nothing in the contention that the company should have returned the property to the consignor. He made no demand therefor. On the contrary, he insisted upon the company transporting the goods to their destination without complying with his obligations under the contract. The position of the company, therefore, was lawful, and it had a right to charge storage for this purpose. The fact that the goods were stored in its cars instead of a warehouse did not change the company's position as a depository for hire. *Miller v. Banking Co.*, 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323.

7. It appears that the Central Railway adopted rule 4, § 2, of the car service rules, which is in the following language:

Dixon v. Central of Georgia Ry. Co

"On cars placed for loading, free time will expire forty-eight hours from the time the loading of car commences, and car-service charges will continue on same until shipping instructions are given and bill of lading taken out." In accordance with the power conferred upon the railroad commission by virtue of Civ. Code, § 2206, to prescribe a schedule of maximum rates and charges for storage of freight, the commission has passed rules known as "demurrage rules," regulating charges for storage of goods in cars, which rules are similar to the car-service rule above quoted. The rates charged by the Central in this case were within the limits prescribed by those regulations. The term "demurrage," as used in its technical sense, applies to maritime law, and has been held by some authorities that it is confined to carriers by water; but it is evidently, under these rules of the commission and by railroad companies, not used in its technical sense. It was no doubt adopted as a convenient term, as contended by counsel for defendant in error, to represent the storage of goods in cars, as distinguished from the storage in warehouse. The right to charge for such storage in cars arises when the goods are necessarily detained by virtue of the failure of the shipper to comply with his obligations to the carrier. The company is in this way deprived of the use of its cars, and, even if the rules adopted in this particular case as to such charges did not apply, they would still be entitled to reasonable charges as a warehouseman or as a depository for hire. In 28 Am. & Eng. Enc. Law, p. 667, it is stated: "In the absence of a special agreement as to charge, the law implies a contract to pay a reasonable compensation." In Elliott, R. R. § 1567, that author, in discussing this subject, says: "While it is probably true that this right [of demurrage] is derived by analogy from the maritime law as administered in America, the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases." The author then quotes the following observation

Delivery—Rail-  
road as Ware-  
houseman—Lien  
for Storage  
Charges.

*Dixon v. Central of Georgia Ry. Co*

from one of the decisions of the courts: "We see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea." On the same line, see *Norfolk & W. R. Co. v. Adams*, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530; *Kentucky Wagon Mfg. Co. v. Ohio & M. Ry. Co.*, 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850; 9 Am. & Eng. Enc. Law (2d Ed.) p. 261.

It is insisted by counsel for plaintiff in error that, even conceding the railway company had a right to make charges for storage of goods, it had, by operation of law, no lien upon the property itself. If we are correct in the conclusion that the defendant in error occupied the position of a warehouseman, then, under the laws of this state, it has a lien upon the property, and can retain possession thereof until it is paid. Section 2928 of the Civil Code declares: "Depositories for hire are bound to exercise ordinary care and diligence, and are liable as in other cases of bailment for hire; they have a lien for their hire, and may retain possession until it is paid." Section 2930 declares: "A warehouseman is a depository for hire, and is bound only for ordinary diligence," etc. The right of the retention of goods by a carrier for charges for freight and storage, even when the property is stored upon cars, was virtually recognized by this court in *Pennsylvania Steel Co. v. Georgia Railroad & Banking Co.*, 94 Ga. 636, 21 S. E. 577. In that case it appeared that tons of rails, spikes, bolts, etc., had been shipped in car-load lots, which came into possession of the defendant railroad company as the last connecting line. From each consignment the defendant retained one or two cars to secure itself for the freight and demurrage it claimed on such consignment, and delivered to the consignee the rest of the cars. It was held in that case that payment of the freight and storage must be made before the consignor can obtain possession. In *Miller v. Banking Co.*, 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, this right of a carrier to collect its reasonable charges for storage in its cars was

## Dixon v. Central of Georgia Ry. Co

clearly recognized. In that case it seems the same rate was charged by the railroad company as in the case at bar, and it was there held the fact that this regulation was promulgated by a board of persons representing a combination of such carriers made no difference. On page 571, 88 Ga., page 318, 15 S. E., and page 327, 18 L. R. A., SIMMONS, J. (now C. J.) stated in his opinion the following: "We do not think it material, as affecting the right to make a charge of this character, that the goods remain in cars instead of being put into a warehouse." This right of the retention of the property to enforce its lien is recognized in Kentucky Wagon Mfg. Co. v. Ohio & M. Ry. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850; and also by the following language in 4 Elliott, R. R. p. 2439, § 1567: "It was held in the cases cited in the first note to this section that a railroad company can have no lien for demurrage charges, but, as we have seen, those cases denied *in toto* the right to charge for delay or detention of cars, in the absence of a contract, and, to that extent at least, are contrary to the weight of authority. In several of the cases which assert the right to charge demurrage, it is expressly held that the company may have a lien for such charges, and in others there are intimations to the same effect."

Counsel for plaintiff in error cite some authorities in conflict with this view. Among them attention is called to 9 Am. & Eng. Enc. Law (2d Ed.) p. 270, where it is stated: "By the weight of authority, a railroad company has no lien on goods shipped for demurrage or damages in the nature of demurrage for delay in unloading the same, and consequent detention of cars or other property, unless a lien is given by contract or by statute." The author cites a few cases in support of the text, and makes no reference to the decided weight of authority to the contrary, including the decision of our own court in Miller v. Banking Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323. Besides, as above indicated, we think the statute of Georgia does give a lien which

Dixon v. Central of Georgia Ry. Co

necessarily follows upon the relation of warehouseman that the company in this case sustained to the owner of these goods.

8. Counsel for plaintiff in error contend in the motion for a new trial, bill of exceptions, and also in the argument, that the Central had no right to retain the whole shipment for the payment of its charges, and that the question of reasonableness or unreasonableness of so doing was improperly withheld by the court from the jury. It was urged that the value of the coal on one car would have been amply sufficient to have met these charges, and that the other three should have been delivered at the place of destination. All four cars were delivered under one entire contract, and we think section 2928 of the Civil Code upon the subject gives the right to retain possession of the entire property thus stored until the charges for such storage are paid. The case of *Pennsylvania Steel Co. v. Georgia Railroad & Banking Co.*, 94 Ga. 636, 21 S. E. 577, is cited in behalf of plaintiff in error as authority for their contention. In that case it appeared that the railroad company did not retain all the cars, but only a portion of them; and it was contended by the *Pennsylvania Steel Company* that each car constituted a separate shipment, and the amount due on each was readily ascertainable, and that defendant, in delivering the freight, departed from its general custom requiring cash before delivery. A demurrer to the declaration was sustained, which was affirmed by this court. There is no indication whatever that the railroad company did not have an equal right to retain all the cars instead of a portion thereof. In 28 Am. & Eng. Enc. Law, pp. 663, 664, the author recognizes, as accompanying the lien of a warehouseman on property stored with him, the right to retain possession of the goods until satisfaction of the charges imposed upon them. Under that text, a number of authorities are cited. *Morgan v. Congdon*, 4 N. Y. 552; *Schmidt v. Blood*, 24 Am. Dec. 145; *Barker v. Brown*, 138 Mass. 340. In view of the above principles, it is quite man-

Same-Same-  
Same-Posses-  
sion of Goods.

## Notes

ifest that the claim of offset made by the plaintiff in error to the foreclosure of this lien was properly not submitted by the court to the jury. The demurrer or storage charges that had been running against the shipper in this case could have been readily prevented by paying the freight charges demanded by the carrier, and the unfortunate position in which the shipper was placed by such detention was the result of no legal wrong whatever done him by the carrier, but was caused by the shipper's failure to comply with the legal obligations under his contract. Of course, therefore, the shipper had no legal claim against the company for the detention of his property.

9. The motion for a new trial contains a large number of grounds not specifically set forth in this opinion. These grounds, about 35 or 40 in number, are subdivided, many of them, into distinct points of law made Case at Bar. thereon, making the several charges of error complained of amount in number to some 80 or 90. In the above treatment of this case, however, we think the principles enunciated cover every point worthy of any consideration whatever involved in the writ of error, and those decided are certainly controlling in this case. Applying these principles to the testimony introduced upon the trial, and our conclusion is that the evidence demanded the verdict. We will take this occasion to remark that, in the investigation of the principles of law controlling this case, we have been materially aided, and our work greatly facilitated, by the condensed, but thorough, brief of learned counsel for defendant in error. Judgment affirmed. All the justices concurring.

## NOTES.

**Delivery to Carrier.**—Where the goods have not been received with express orders for transportation or wherever there is some act remaining to be done by the consignor before the goods are forwarded, a railroad company receiving and retaining them is not liable as a carrier but as a warehouseman merely. *Barron v. Eldredge*, 100 Mass. 455; *St. Louis R. Co. v. Montgomery*, 39 Ill. 335; *Michigan*

## Georgia &amp; A. Ry. v. Pound

R. Co. v. Shurtz, 7 Mich. 515; Watts v. Boston & Lowell R. Co., 106 Mass. 467; Judson v. Western R. Co., 4 Allen 520; Nichols v. Smith, 115 Mass. 332; McDonald v. Western R. Co., 34 N. Y. 497. But see Michaels v. New York R. Co., 30 N. Y. 564.

If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods; but if the goods are not ready for the immediate transportation until something further is done, or further directions are given by the owner, the carrier will be responsible only as a warehouseman. St Louis R. Co. v. Montgomery, 39 Ill. 335; Watts v. Boston & Lowell R. Co., 106 Mass. 467; Judson v. Western R. Co., 4 Allen 520; Nichols v. Smith, 115 Mass. 332; Barron v. Eldredge, 100 Mass. 455; Michigan R. Co. v. Shurtz, 7 Mich. 515; McDonald v. Western R. Co., 34 N. Y. 497; Basnight v. Atlantic & N. C. R. Co., 111 N. Car. 592, 16 S. E. Rep. 323; Pittsburgh, C. & St. L. R. Co. v. Barrett, 3 Am. & Eng. R. Cas. 256, 36 Ohio St. 448.

When Carrier's Liability as Warehouseman Begins before Removal of Goods.—See Berry v. West Virginia & P. R. Co. (W. Va.), 11 Am. & Eng. R. Cas., N. S., 103, and extensive note, 111 *et seq.*

## GEORGIA &amp; A. RY.

v.

## POUND.

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(*Supreme Court of Georgia, June 5, 1900.*)

Carriers of Freight—Liability as Warehouseman.\*—As was decided in *Almand v. Railroad Co.*, 22 S. E. 674, 95 Ga. 775, "where goods are shipped by rail, and arrive at destination within the usual time required for transportation, and are there deposited by the railroad company in a place of safety, and held ready to be delivered to the consignee on demand, the company's liability as a common carrier, in the absence of a contrary custom of trade as to delivery, ceases, and its liability as a warehouseman begins."

Same—Same—Usages and Customs.—In order to show the existence of a custom varying to the general rule as above announced at

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\*See *Berry v. W. Va. & P. R. Co. (W. Va.)*, 103, and notes, 111 *et seq.*

Georgia & A. Ry. v. Pound

a particular place by reason of the railroad company having observed a usage of notifying consignees of the arrival of goods, it must be affirmatively proved that this usage was of an established and general nature, and that the notices given in pursuance thereof were of such character as to indicate, or to reasonably warrant the inference, that the company intended to remain liable as a common carrier until the consignee, in each instance, had had reasonable time and opportunity to remove his goods from its custody.

**Same—Same—Same—Sufficiency of Evidence.**—Such a custom is not sufficiently proved by evidence which shows no more than that the company had been in the habit of notifying a particular customer, by postal card, of the arrival of his goods, and informing him that storage or demurrage would be charged thereon unless they were called for within a time specified, and that it had in this manner, and also by messages, by telephone and otherwise, given similar notices to other customers, in some of which it was stated that unless the goods were removed as requested they would be "held" or "stored" at the owner's risk.

**Arguments to Jury.**—It is not, in the trial of an action against a railroad company for the value of goods alleged to have been burned in its depot, proper to allow counsel for the plaintiff to argue to the jury that his client is entitled to recover money collected by the company for insurance, when there is no evidence that the plaintiff's goods were covered by insurance, or that the defendant received anything from an insurance company on account of the loss thereof.

(Syllabus by the Court.)

**ERROR** by defendant from Dooly county superior court.  
*Reversed.*

*E. A. Hawkins*, for plaintiff in error.

*W. H. Dorris, Pearson Ellis, and J. T. Hill*, for defendant in error.

**LEWIS, J.** This was a suit brought by B. B. Pound against the Georgia & Alabama Railway Company for damages resulting from loss by fire of certain dry goods in defendant's depot at Cordele, Ga. It appears from the record that the freight depot of plaintiff in error was accidentally destroyed by fire on August 4, 1897, at which time defendant in error had a shipment of dry goods burned in said depot. These goods were received in Cordele on July 27, 1897, and placed in the company's

Case Stated.



Georgia &amp; A. Ry. v. Pound

warehouse, having arrived at destination within the usual time required for transportation. It is not contended that the fire was caused by the negligence of the railway company, or its servants or employees, and there was no proof tending to show any carelessness or negligence upon the part of the company. But defendant in error relied upon the contention that the company had established a custom in Cordele of notifying its customers of the arrival of goods, and that, therefore, its liability as carrier continued until such notice was given. In this instance he testified that he had received no notice of the arrival of these goods until a day or two after their destruction. After hearing evidence, the jury returned a verdict for the plaintiff; whereupon the defendant made a motion for a new trial, and alleges error in its bill of exceptions upon the judgment of the court below in overruling this motion.

1. Civ. Code, § 2279, declares: "The responsibility of the carrier commences with the delivery of the goods, either to himself or his agent, or at the place where he is accustomed or agrees to receive them. It ceases

Carriers of  
Freight—Liabil-  
ity as Ware-  
houseman.

with their delivery at destination according to the direction of the persons sending, or according to the custom of trade." The law nowhere imposes upon common carriers the obligation of notifying consignees of the arrival of their freight at the point of destination, provided it has arrived in the due course of transportation. As a general rule a railroad company is responsible as common carrier only for the safe deposit of goods shipped by freight upon the platform or in the warehouse of the road at the end of their transit, there to await delivery to the consignee when he should call for them; and from the time of such deposit, even without notice by the carrier to the consignee, the liability of the railway is usually changed from that of a common carrier to that of a warehouseman. See this doctrine thoroughly discussed in *Hutch. Carr.* § 367 *et seq.* This general doctrine has been clearly recognized by repeated decisions of this court, and the language of the

Georgia & A. Ry. v. Pound

first headnote is copied from the decision in the case of *Almand v. Railroad Co.*, 95 Ga. 775, 22 S. E. 674. See, also, authorities therein cited.

2, 3. As a general rule of law, then, it follows that after the company has placed goods at their destination within the usual time required for transportation, and are there by it deposited in a place of safety, and held ready to be delivered on demand, its liability <sup>Same—Same—  
Usages and Cus-  
toms.</sup> as a common carrier ceases, and that of a warehouseman commences. The only exception to this rule is where the custom of trade is shown to be otherwise as to delivery. In order to show the existence of such a custom varying this general rule at a particular place, by reason of the company having observed a usage of notifying consignees of the arrival of goods, it should be affirmatively shown that this usage was of an established and general nature. The notice given in pursuance thereof should be of such a nature as to reasonably warrant the inference that the company intended to remain liable as a common carrier until the consignee, in each instance, had reasonable time and opportunity to remove his goods from its custody. Upon examining the record in this case, we think it fails to show the establishment of such a usage and custom on the part of the plaintiff in error as would make it liable as a common carrier until notice is given by it to the consignee of the arrival of his goods. The plaintiff below testified in his own behalf, in effect, that he was never given any notice of the arrival of these goods sued for until after they were destroyed by fire; that the company's agent usually sent out postal cards stating that there were so many cases of shoes, notions, etc., arrived at a certain time, and, if not removed within a specified time, they would be subject to a certain amount of demurrage. This card he had not received before the destruction of these goods by fire. The card referred to was only a notice to the consignee that unless the goods were removed by a certain time he would be

## Georgia &amp; A. Ry. v. Pound

charged storage for them, and he testified that he thought the main feature of the notice was to carry out its purpose of not charging such storage or demurrage until after it gave that notice, and he further admitted in his testimony that he could not say that he had always been getting such notices on the arrival of his goods at the defendant's depot in Cordele. There were a few other witnesses introduced who testified to receiving the same notice as to goods consigned to them. We do not think it can be fairly inferred from the contents of this notice that it was the intention of the plaintiff in error to remain liable as a common carrier while the goods were stored in its warehouse at the point of destination until notice of their storage was given to the consignee, but the evident purpose of this notice was simply to notify the consignee that if he did not remove his goods at a certain time he would likewise be charged with storage. The only custom, then, the record tends to establish was for the company to give such notice to a party before preferring against him a charge for demurrage, and we cannot see how it can be implied from this custom that the company thereby agreed to remain liable as a common carrier up to the time of the notice in reference to storage. It is true there was some evidence introduced in behalf of the plaintiff below by two or three witnesses that they had received notices to the effect that, unless their goods were removed from the company's warehouse, they would be held or stored at the owner's risk. It might with plausible force be argued that a notice of this sort carried with it the implication that the common carrier retained the goods entirely at its own risk as a common carrier or an insurer of their safety until this notice is given. But the evidence in the record absolutely fails to establish anything like a general custom of the company to give such notice, and it was only shown in one or two isolated instances. The testimony in behalf of the company was to the effect that there was no special custom of dealing with customers in reference to giving them notice in regard to the arrival of freight; that

Georgia &amp; A. Ry. Co. v. Pound

they were sometimes notified by postal cards, sometimes by telephone, by draymen, and in person; and we think there is nothing in the record to contradict the proof offered in behalf of the company that there was really no fixed rule upon this subject. The evidence fails to establish such a usage or custom on the part of the company's employees as would authorize the conclusion that the company, at this particular station, had waived its clear legal rights simply as a warehouseman, and had assumed the responsibility of a common carrier and insurer of the property up to the time of giving notice to the consignee that his goods had arrived at destination, and had been stored in its warehouse.

Same—Same—  
Same—Same—  
of Evidence.

4. Complaint is made in the motion for a new trial that the court erred in permitting, over objection of counsel for the company, plaintiff's attorney to argue to the jury in conclusion that the plaintiff was entitled to recover of the defendant at least his *pro rata* of the insurance money upon the contents of the depot.

Arguments to  
Jury.

While there is some evidence in the record showing that there was a collection of some insurance money as the result of loss occasioned by this fire, yet the evidence is uncontradicted that none of the goods of the defendant in error were covered by this insurance, nor does it appear that the company received anything from the insurance company on account of plaintiff's loss. It was therefore error to permit counsel for plaintiff below to contend for liability of the railway company on account of any insurance it collected growing out of this fire. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

Dobson v. New Orleans &amp; W. R. Co

DOBSON

v.

NEW ORLEANS &amp; W. R. Co.

*(Supreme Court of Louisiana, April 2, 1900.)*

**Injury to Employee—Fellow Servants—Employees in Different Departments.\***—In case it is established by the evidence that the plaintiff was the foreman of a gang of laborers who were engaged in hauling dirt with a train of flat cars, and sustained injury by a collision of the train with a cow on the track in the nighttime, and which accident was caused or contributed to by the conductor's abandonment of the train, the defendant will not be relieved from liability on the ground that the plaintiff and conductor were fellow servants.

(Syllabus by the Court.)

**APPEAL** by plaintiff from parish of Orleans civil district court. *Reversed.*

*Benjamin Rice Forman and B. R. Forman, Jr., for appellant.*

*Farrar, Jonas & Kruttschnitt, for appellee.*

**WATKINS, J.** This is an action for the recovery of \$20,000 damages for personal injuries which the plaintiff alleges he sustained at the hands of the defendant. On the issue joined and trial had before the district judge, a decree was rendered in favor of the defendant, rejecting the demands of the plaintiff, and the latter prosecutes this appeal.

The statement of the plaintiff's case, as it appears in the petition, is substantially as follows, to wit: That on the 5th day of August, 1896, petitioner was employed as foreman of laborers by the defendant, and, in the course of his occupation as such, was a passenger, entitled to safe carriage, on board a freight train of the defendant, which was used by

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\*See note at end of case.

*Dobson v. New Orleans & W. R. Co*

said company to transport its laborers, foreman, and employees from New Orleans to Chalmette; that said train at the time of the accident complained of, being bound from New Orleans to Chalmette, was operated with an engine in the rear, with no light on the front end of same; that there was no gong sounded, or other signal given of its movement, and there was no watchman or lookout on the train, who could have given to the engineer at the rear end due notice of there being any obstacle or stock on the track which might interfere with its safe movement; that through this gross carelessness and neglect of the defendant, its agents, servants, and employees who were operating the train, the accident occurred, and the injury was inflicted upon him. Plaintiff assigns as a further evidence of fault and negligence that the train conductor and all the train crew, except the engineer, got off the train and left the engineer in exclusive charge of same, and he being at the rear end, and unable to see the track at the forward end, it ran over a cow on the track, and thereby the train was wrecked, and particularly the car on which he was a passenger was derailed, whereby he was "lacerated, mashed, and bruised," his arm was broken, and his leg was injured, whereby he has been permanently injured and incapacitated from work and earning a living; this occurrence having taken place during the darkness of the night. For answer the defendant denies that plaintiff was a passenger upon any train of the defendant, or that he was entitled to the rights of a passenger, but, on the contrary, avers that the plaintiff was foreman of a dirt train, engaged in hauling dirt and doing repair work along the line of the defendant railroad, and was injured by the said train accidentally running over a cow which was on the track, and that the accident happened entirely without any negligence on the part of the defendant, and, if there was any negligence, it was the negligence of the plaintiff's fellow workmen, for which this company is not responsible. The answer concludes thus: "Defendant avers that the plaintiff was cared for at its cost, his doctor's and hospital bills paid, his wages

Dobson v. New Orleans &amp; W. R. Co

continued during the time that he was laid up, and that when he recovered he returned to the service of the defendant, and remained in its service until the 8th day of May, 1896, when he voluntarily quit; that he never at any time made any complaints of disability to do his work, and perform his work on all occasions satisfactorily, except upon one occasion, when he was reprimanded for negligence, and the plaintiff took offense at this reprimand, quit the service of the company, and brought this suit." For the foregoing reasons, defendant prays that plaintiff's demand be rejected at his cost. The reasons assigned by the district judge for his decree in favor of the defendant are very brief, and as follows, to wit: "Plaintiff was a fellow servant of the train hands. They were all engaged in the same labor of carrying sand or gravel from one point to another along the line of the road for the construction of the roadbed. Besides, the whole fellow-servant doctrine is founded upon the still broader doctrine that a servant engages to encounter all the risks which are incident to the service he undertakes, so that when a servant well knows the existence and extent of the risk or hazard, and willingly exposes himself to it, he cannot recover if injured. *Stucke v. Railroad Co.*, 50 La. Ann. 189-295, 23 South. 342. The plaintiff well knew of the custom of backing the train at night without headlight or watchout. Even a child might have foreseen the consequences, and yet he voluntarily rode thereon for his own convenience."

The two disputed propositions of the case are (1) whether the plaintiff was a passenger, and entitled to safe carriage on the defendant's train; (2) whether he was foreman of a dirt train engaged in hauling dirt and doing repair work along the line of the defendant railroad at the time of the accident, which was due to the negligence of plaintiff's fellow workmen, for which the company is not responsible.

An examination of the evidence shows the following facts, substantially: That plaintiff states that the accident whereby the injury was inflicted upon him occurred upon the 5th of August, 1896, while he was engaged at work for

Dobson v. New Orleans & W. R. Co

the defendant. That he was foreman over the crew of negro laborers, and that they had been sent out at night to take a dirt train along the line of the Bone Factory and Gentilly road, and while coming back, at 11 o'clock at night, he was injured. That the train was on its way from New Orleans to Chalmette at the time of the accident. That the engine was on the rear end of the moving dirt train, and no lookout in the front end. That when the accident occurred, by the train having encountered a cow upon the track, the conductor and all the train crew, except the engineer, had left the train,—as he supposed, on account of the badness of the night, and their desire to get to their homes as soon as they could. That, by the collision of the train with the cow, several cars were derailed, and, among the number, the one on which he was riding. That, as a result of the collision, he was struck in the back by the car on which he was riding, and one of his arms was broken and one of his legs was injured. That he was dashed down, and the car fell upon him, and he was dug out from beneath the car. That his back and leg and knee were likewise injured. That on account of his injuries he was taken to the Hotel Dieu, where he was under treatment for about four months, and that he was unable to go to work for six months. That at the time he was getting \$60 per month, and now he is working at Fabacher's Restaurant, at \$15 per month.

The following is a part of the interrogation of the plaintiff, *viz.*: "Q. How did you happen to be on this train when the accident occurred? A. I was foreman over a crew of negro laborers, and we were sent out that night; and at the time we were taking sand, you understand, from the river and putting it on the track along the roadbed. They used to send these trains out at night, so as to get the gangs together and get out quick; and so this night I was sent to unload a train, and the accident happened. Q. You were instructed to go with your crew and unload the train? A. Yes, sir. Q. You had nothing to do with the running of the train? A. No, sir. Q. The train had a foreman, an engineer, and



Dobson v. New Orleans &amp; W. R. Co

a conductor, and the crew, to run it? A. Yes, sir. Q. Where did you get on the train? A. On the Gentilly road, at the bone factory. Q. Is that where you were taking the dirt? A. We were [landing] it there, but I got on the train at Chalmette. Q. Where did you first get on the train? A. At Chalmette. Q. Did you and your gang [load] your train with dirt at that point? A. No, sir; it was loaded at Chalmette. Q. It was loaded at Chalmette, and you and your gang got on it for the purpose of coming to what point? A. To the Bone Factory and Gentilly road. Q. Was it not coming from Chalmette to the bone factory when the accident occurred? A. No, sir. Q. After you had unloaded the dirt, they backed [the train] up? A. Yes, sir. Q. To get some dirt? A. That was the last trip of the night. Q. Your quarters were down there? A. Yes, sir. Q. And also the gang's quarters? A. Yes, sir; we were all going back. Q. Where did this accident occur? A. Two miles from Chalmette." The foregoing are answers that were given by the plaintiff to interrogatories that were propounded by the court, and during his further examination by his counsel nothing contrary or additional thereto was developed. Several of the laborers who had been on the train, but had departed therefrom when it halted in the vicinity of the slaughter house, corroborate the plaintiff's testimony, substantially. From the foregoing testimony, it is evident: That the plaintiff, as foreman of a gang of laborers, had embarked upon a dirt train of the defendant, which was laden with sand that was to be transported a distance of several miles and discharged, for the uses and purposes of the company. That the train had made its trip with safety, its load of sand had been discharged, and it was on the return trip to Chalmette; and, when at a point on the road in the vicinity of the slaughter house, the train was halted, the laborers took their departure for their homes, and the conductor and all the train crew, except the engineer, likewise left the train. The engine being attached to the rear end, and there being neither a headlight on the forward end of the train, nor any

*Dobson v. New Orleans & W. R. Co*

one posted thereon for the purpose of giving to the engineer notice of any obstacles that might be on the track, the train was suddenly and without warning brought in collision with a cow, which caused several of the cars to be derailed, and especially the third one from the forward end, on which the plaintiff was seated, and thereby he sustained the serious injuries which he has related; the occurrence having taken place at about the hour of 11 o'clock p. m., the night having been dark and rainy, and the train being run at a rapid rate of speed.

We think the defendant is liable, and that the principles of law which were announced in *Stucke v. Railroad Co.*, 50 La. Ann. 172, 23 South. 342, are entirely applicable, and that the defense of fellow service cannot properly be applied under the facts of this case. The evidence makes it perfectly clear that neither the engineer who was left in charge of the train after the departure of the train conductor and the remainder of the crew, nor the plaintiff, was guilty of any fault; and it shows conclusively that the cause of the accident was the direct and immediate result of the train being without a headlight in front, and without any one being posted thereon to keep a lookout for obstacles on the track, and to communicate any danger to the engineer. This fault was contributed to by the departure of the conductor before the train had reached its destination, thus leaving the engineer to his own resources. It would not be admissible for this court to hold, under these circumstances, that the plaintiff, as a servant of the defendant, had assumed such a risk or hazard as one that was "apparently incidental to an employment intelligently undertaken." *Smith v. Sellars*, 40 La. Ann. 527, 4 South. 333. But if, in point of fact, there was co-association and fellow service between the employment of the plaintiff and the engineer, the plaintiff was not guilty of contributory fault, if the engineer was not guilty of negligence. In our opinion, we cannot do better than cite and collate a few extracts from the authorities cited in the *Stucke Case*, as the best means of stating the princi-

Dobson v. New Orleans &amp; W. R. Co

ples of law upon which our decision must rest, the trend of which is that there is no co-association or fellow service between the conductor of the dirt train and the plaintiff, who was a foreman of a gang of laborers who were engaged in hauling dirt. In the Stucke Case it is said: "It is equally evident that there was neither co-association nor fellow service between the conductor \* \* \* and the plaintiff, who was working temporarily in the emergency pit. Their service and employment sustained no possible relation to each other. \* \* \*. [But], if the plaintiff had been a fellow servant of either of said servants, that fellow service would not relieve the defendant from the just consequences of its own fault and negligence, to which the plaintiff did not contribute." In *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266, the court say: "That if the negligence of the company contributed to (that is to say, had a share in producing) the injury, the company was liable, even though the negligence of a fellow servant of Cummings was contributory, also. If the negligence of the company contributed to, it must have necessarily been an immediate cause of, the accident, and there is no defense that another was likewise guilty of a wrong." In *Towns v. Railroad Co.*, 37 La. Ann. 630, this court held: "It is now settled, upon the very highest authority, that when the injury is caused partly by the negligence of a fellow servant, and partly by the failure of the company to provide proper and suitable apparatus, the negligence of the co-servant will not exonerate the company from the consequences of its own fault;" citing *Railway Co. v. Cummings*, *supra*. In *Myhan v. Power Co.*, 41 La. Ann. 964, 6 South. 794, 7 L. R. A. 172, this court very clearly defined the duty of the master to its servants, in regard to employing them in any dangerous enterprise, in the following emphatic language: "At any rate, it was the duty of the defendant company to have known of the dangerous character and condition of the electric wires. The knowledge which they ought to have had, the law presumes, *juris et de jure*, they had. Even had

Dobson v. New Orleans &amp; W. R. Co

the company's representatives sworn that they did not know of the same, such ignorance on their part would not have exonerated them. A superior is presumed to know, and in law knows, that which it is his duty to know, namely, whatever may endanger the person and life of his employee in the discharge of his duties." In *Laning v. Railroad Co.*, 49 N. Y. 534, the proposition is very well put, in these words, to wit: "That some general agent, clothed with the power to make performance for the master, has not done his duty at all, or has not done it well, neither shows a performance by the master, nor excuses the master's nonperformance. When it is done, and not till then, his duty is met, or his contract is kept. \* \* \* If a master's personal knowledge of defects be necessary to his liability, the more he neglects his business and abandons it to others, the less will he be liable." The principle announced in that case was applied by this court in *Poirier v. Carroll*, 35 La. Ann. 699. But the case of *Railway Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, 5 Sup. Ct. 184, 28 L. Ed. 787, states the governing rule with regard to the liability of fellow servants in the course of the operation of railroad trains in the following language, to wit: "When the service to be rendered requires for its performance the employment of several persons, as in the movement of trains, there is necessarily incident to the service of each the risk that the others may fail in the vigilance and caution essential to his safety; and it has been held in numerous cases, both in this country and in England, that there is implied in his contract of service in such a case that he takes upon himself the risks arising from the negligence of his fellow servants while in the same employment, provided, always, the master is not negligent in his selection or retention, or in furnishing adequate materials and means for the work, and that, if injuries then befall him from such negligence, the master is not liable." But in applying the foregoing principles the court stated the following exception to that rule, and said: "The doctrine assumes that the servant causing the injury is in the same employment with the serv-

*Dobson v. New Orleans & W. R. Co*

ant injured; that is, that both are engaged in one common employment. The question in all cases, therefore, is, what is essential to render the service in which different persons are engaged a common employment?" In answering that question the court makes the following quotation from the opinion of the lord chancellor in *Coal Co. v. Reid*, 3 Macq. 266, to wit: "It is necessary, however, in each particular case, to ascertain whether the servants are fellow laborers in the same work, because, although a servant may be taken to have engaged to encounter all the risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. When servants, therefore, are engaged in different departments of duty, and an injury is committed by one servant upon another by carelessness or negligence in the course of his peculiar work, it is not within exemption, and the master's liability attaches in that case in the same manner as if the injured party stood in no such relation to him." The court also cited with approval an extract from the opinion of the lord chancellor in *McNaughton v. Railroad Co.*, 19 Ct. Sess. Cas. 271, to wit: "That the master's liability might be sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work; the deceased being a joiner or carpenter, who at the time of the accident was engaged in repairing a railroad carriage, and the persons by whose negligence his death was occasioned were the engine driver and the person who arranged the switches." The court thereupon, in the principal case, in summing up, said: "To bring the case within the exemption, there must be this most material qualification,—that the two servants must be men in the same common employment, and engaged in the same common work under that common employment. \* \* \* There is, in our judgment, a clear distinction to be made, in the relation to their common principal, between servants of a

Dobson v. New Orleans &amp; W. R. Co

corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants.

\* \* \* In no proper sense of the term is he a fellow servant with the foreman, brakeman, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction. As to them and the train he stands in the place of and represents the corporation." In *Towns v. Railroad Co.*, 37 La. Ann. 630, this court recognized and applied the principle announced in that case. In *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612, the court made reference to the Ross Case, and said that that court had "placed a very important limitation upon it [the doctrine of fellow service], by holding that the conductor of a train and the employees do not bear the relation of fellow servants to [each other], and that the company is responsible to them for the injuries resulting from his neglect of duty." In *Railroad Co. v. Baugh*, 149 U. S. 368, 54 Am. & Eng. R. Cas. 328, 13 Sup. Ct. 914, it is stated, as an exception to the rule, that an engineer and fireman of a locomotive engine, running along without any train attached, are fellow servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former; but in so doing the court distinguished that case from the Ross Case, and affirmed the latter.

From the foregoing authorities, as well as from the principles announced in the Stucke Case, we think it is clear that there was neither fellow service nor co-association between

*Dobson v. New Orleans & W. R. Co*

the plaintiff and the conductor of the freight train; and consequently the fault of the conductor in having abandoned the train, and subjected it to the peril of the accident which happened afterwards and caused the injury to the plaintiff, cannot relieve the defendant from liability. For the reasons assigned, and those cited in the opinion referred to, we think the judgment appealed from is erroneous, and must be reversed. The proof shows that the plaintiff received painful and serious injuries by the accident; the car on which he was riding having been derailed, he being thrown violently to the ground, and the car precipitated upon him, whereby his arm was broken and other serious injuries inflicted. As a result of the accident, he was sent to the hospital, where he remained under treatment for four months, and was rendered unable to do any work for a period of six months. On account of the injuries inflicted, he was disabled from performing ordinary service such as he was engaged in at the time of the accident, and was only capable of doing some kinds of lighter work for some time thereafter. The proof discloses that after the accident happened the defendant's doctor attended the plaintiff at the hospital and administered to his injuries, and that the company paid his wages during his four months' confinement therein, and when his broken arm was healed it gave him other employment. Of this commendable and highly praiseworthy course of conduct, we feel it our agreeable duty to make mention. But, while approving the company's acts of humanity and kindness, we cannot admit that it has thereby completely exonerated itself from all responsibility for the reparation of the plaintiff's injuries, though we do think that it has the effect of mitigating the damages which plaintiff is entitled to recover from the company. We think the evidence justifies an allowance in his favor of the sum of \$1,000 as damages. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the plaintiff do have and recover of

O'Neill v. Great Northern Ry. Co

the defendant the sum of \$1,000, with legal interest from judicial demand, and all costs.

NOTE.

**Fellow Servants.**—Compare *New England R. Co. v. Conroy* (U. S.), 16 Am. & Eng. R. Cas., N. S., 380, which overrules the *Ross Case* on which the finding in the principal case seems to be based. As to whether trackmen and trainmen are fellow servants, see *note*, 14 Am. & Eng. R. Cas., N. S., 586.

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O'NEILL

v.

GREAT NORTHERN RY. CO.

(*Supreme Court of Minnesota, May 28, 1900.*)

**Injury to Employee—Assumption of Risks.\***—Where a servant is injured, being caught by a bolt which remains in a timber in the work of tearing away a portion of a bridge, he assumes the danger of the negligence of his fellow servants, as well as the apparent and probable risks of the service in which he is engaged.

**Fellow Servants—Road Master and Laborer.\***—The road master of a railroad company, directing such work, as in this case, is not the vice principal of the employer to the extent that his omission to give a particular warning of a detail thereof which portends danger would render the master liable for his omissions in that respect.

(Syllabus by the Court.)

APPEAL by defendant from Polk county district court.  
*Reversed.*

*C. Wellington, Wm. R. Begg, and A. C. Wilkinson*, for appellant.

*H. Steenerson and W. E. Rowe*, for respondent.

LOVELY, J. Action for injuries sustained by plaintiff while working as a common laborer on defendant's road.

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\*See notes at end of case.



## O'Neill v. Great Northern Ry. Co

Plaintiff had a verdict. Upon motion for a new trial the same was denied, conditioned upon the reduction of the recovery, to which he consented. Thereupon defendant appeals to this court.

At a place where defendant's road crossed a ravine on a trestle, the same was filled in by substituting an embankment of earth to support the track in place of the trestle. This undertaking seems to have been carried out as a part of the work of surfacing a considerable portion of the road, wherein a gang of 35 men were working under the directions of defendant's road master. After the trestle had been filled in very nearly to the surface of the track, some 20 men of the gang were detached from the rest of the crew, and required to go upon the embankment to remove and throw the stringers upon which the ties rested over the same, evidently to make room for a further fill, surfacing other ties, and a new track. In the original construction of the trestle the ties rested upon the stringers, which were 40 feet in length, running lengthwise, and resting upon cross timbers beneath. Upon these stringers the ties had been laid transversely. At regular intervals long iron bolts or spikes were driven through the ties and stringers, extending into the timbers beneath, thereby holding secure in combination the ties, stringers, and timbers. The track had been pushed to one side, the bolts were drawn, when the stringers would be moved to the edge of the embankment, and either thrown or allowed to roll down the same. It is claimed by the plaintiff that jackscrews were used to withdraw the bolts from the stringers and timbers into which they extended, and that he was engaged in placing the jackscrews, but had nothing to do with the work of drawing the bolts. It also appears that all the bolts, some 40 in number, had been drawn, except one at the end of one of the stringers, when, by order of the road master, plaintiff was called to take hold of this stringer at the place where there was an undrawn bolt, when he, with a number of the other men, were to roll it over the embankment; and in obeying this direction he sustained the injuries of which he

O'Neill v. Great Northern Ry. Co

complains. It appears that the upper end of the bolt protruded some inches from the surface of the stringer; and while the plaintiff was at the place where this undrawn bolt was, and in attempting, with the other men, to turn it over, he was caught by the protruding end, and in the usual movements that followed in moving the stringer was, in consequence, thrown with some violence down the embankment. The case was submitted to the jury solely upon the question whether the defendant's road master, Hess, was a vice principal of the defendant (without defining the character of that relation), and was negligent in not giving to the plaintiff a particular warning of the fact that the bolt in question had not been withdrawn, and was liable to injure him. It seems to have been claimed by counsel for plaintiff at the trial that it was the duty of the road master to have given him warning of the precise danger which was liable to and did cause the accident. The road master and a foreman who was present both stated that a general warning to look out for these bolts had been given to all the men at work on the embankment. Conceding that the jury had a right to disregard this testimony, the only evidence remaining to show that no warning of danger was given is that of the plaintiff himself in answer to a question of his counsel, "Did you hear him [Hess] say anything about looking out for that bolt?" referring to the bolt which caught and injured him; to which the plaintiff answered, "No, sir; I did not;" and it must be assumed, the burden being upon the plaintiff, that this evidence, under the instructions of the court, established in the minds of the jury the failure of the defendant to give warning through its vice principal, the road master, which supported the recovery. This clearly involves a palpable misunderstanding of the duty of a vice principal in any supposable case, for such vice principal can only, in any event, represent the master in the performance of some general function of the work in which the employee is engaged. The logical result of this claim in behalf of plain-

Fellow Servants—Road Master and Laborer.

*O'Neill v. Great Northern Ry. Co*

tiff would require from the vice principal not only a general warning of danger in such a case, but notice of every hazard that might occur in the conduct of the work, extending through all its details, and would lead to the absurd and illogical result that there must be present at all times a master or his representative for every servant. Such a claim defeats itself. It has been settled by this court that an employee becomes a vice principal, as respects another servant, only when he is intrusted with the performance of some absolute and personal duty of the master himself, or general management and control of the master's business, or some branch of it. *Brown v. Railway Co.*, 31 Minn. 553, 18 N. W. 834. It was held in an earlier case, not distinguishable in principle from this, that where the negligence of a road master occasioned serious injury to a servant under him, and the defendant had furnished sufficient machinery, and the road master was a competent and proper person for the work, that such road master was a fellow servant in the task of raising wrecked freight cars (*Brown v. Railroad Co.*, 27 Minn. 162, 6 N. W. 484); and the distinctions which exist between a superior servant and a vice principal are clearly designated and distinguished in a still later case, which holds that such superiority of rank in the service does not indicate the relation of vice principal between such superior servant and the one who works under him. The relation referred to arises usually from the peculiar character of the services rendered rather than the grade of employment. *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793. And it follows that, if the evidence in this case tends to show that Hess had knowledge of the undrawn bolt, and failed to warn plaintiff of that fact, such failure was the omission of a fellow servant; also that defendant is not chargeable where the common-law rule prevails as to the right to recover of the master for the acts of a fellow servant; and it only becomes necessary to inquire further whether the failure on the part of Hess to tell plaintiff to look out for the undrawn bolt was

## O'Neill v. Great Northern Ry. Co

negligence under the so-called "Fellow-Servants Act" (section 2701, Gen. St. 1894). But this statute does not apply, for clearly the business in which the road master and other employees were engaged did not, under the decisions of this court, subject plaintiff distinctively to railroad hazards, since the risk he incurred was no other or different in kind than in other employments than railroading. *Lavallee v. Railway Co.*, 40 Minn. 249, 41 N. W. 974; *Johnson v. Railroad Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *Pearson v. Railway Co.*, 47 Minn. 9, 49 N. W. 302; section 2701, Gen. St. 1894; *Weisel v. Railway Co. (Minn.)*, 82 N. W. 576. The plaintiff was an experienced section man of 35 years. He had been engaged in the surfacing work referred to some three weeks before he was hurt, had been in the railroad service as a section man several years, and there is nothing to show that he was not fully aware of the manner in which the work was being conducted in all its varied details. He simply did not know of the protruding bolt that caused the accident, which he did not notice at the time, or he could, as he says, have easily avoided the injury he received. But the manner of conducting the work in which he was engaged was apparent to any person of ordinary intelligence. The peculiar dangers that arose from the demolition of the portion of the bridge structure which was being taken apart and removed was obvious to any one who could use his senses, and indicated unseen risks and dangers from protruding bolts at almost every moment, the risk of which had been clearly assumed by him in connection with the other hazards of the undertaking in which he was engaged, whether a fellow servant working with him was or was not a vice principal. *Walsh v. Railroad Co.*, 27 Minn. 367, 8 N. W. 145; *Olson v. McMullen*, 34 Minn. 94, 24 N. W. 318; *Berger v. Railway Co.*, 39 Minn. 78, 38 N. W. 814; *Quick v. Iron Co.*, 47 Minn. 361, 50 N. W. 244; *Scharenbroich v. Fiber-Ware Co.*, 59 Minn. 116, 60 N. W. 1093; *Smith v. Tromanhauser*, 63

Injury to  
Employee—  
Assumption of  
Risks.

## Notes

Minn. 98, 65 N. W. 144. Order reversed, and a new trial granted.

BROWN, J., absent, took no part.

## NOTES.

**Master and Servant—Assumption of Risk.**—See generally 11 Am. & Eng. R. Cas., N. S., 484 *et seq.*, *note*.

**Criterion of Fellow Service.**—See *Pool v. Southern Pac. Co.* (Utah), 16 Am. & Eng. R. Cas., N. S., 551, and *note*, 570.

**Fellow Servants—Road Masters.**—According to the weight of authority, in the absence of statutory provisions, persons who are road masters or who occupy analogous positions are regarded as vice principals, and a railroad company will be held liable for an injury to other servants occasioned by their negligence. *Tyson v. South. N. & A. R. Co.*, 61 Ala. 554; *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa 52, 38 Iowa 592; *Kansas Pac. R. Co. v. Little*, 19 Kan. 267; *Atchison, T. & S. F. R. Co. v. Moore*, 15 Am. & Eng. R. Cas. 312, 31 Kan. 197, 1 Pac. Rep. 644; *Harrison v. Detroit, L. & N. R. Co.*, 41 Am. & Eng. R. Cas. 398, 79 Mich. 409, 44 N. W. Rep. 1034; *Hall v. Missouri Pac. R. Co.* (Mo.), 8 Am. & Eng. R. Cas. 106; *Lewis v. St. Louis & Iron Mt. R. Co.*, 59 Mo. 495; *Cook v. Hannibal & St. J. R. Co.*, 63 Mo. 397; *Hoke v. St. Louis, K. & N. R. Co.*, 25 Am. & Eng. R. Cas. 463, 88 Mo. 360; *Stevenson v. Jewett*, 16 Hun (N. Y.) 210; *McCosker v. Long Island R. Co.*, 21 Hun (N. Y.) 500; *Louisville & N. R. Co. v. Bowler*, 9 Heisk (Tenn.) 866; *Davis v. Central Vt. R. Co.*, 11 Am. & Eng. R. Cas. 173. But see *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419; *Hamilton v. Iron Mt. Co.*, 4 Mo. App. 464; *Flike v. Boston, etc., R. Co.*, 53 N. Y. 549; *Ross v. Boston & Albany R. Co.*, 58 N. Y. 217; *Basel v. New York Central & H. R. R. Co.*, 70 N. Y. 171.

A road master, upon whom is imposed the duty of directing the repairs of the road and keeping the road in safe condition, is, in the line of his duty, the representative of the company. *Atchison, T. & S. F. R. Co. v. Moore*, 15 Am. & Eng. R. Cas. 312, 31 Kan. 197, 1 Pac. Rep. 644; *Hoke v. St. Louis, K. & N. R. Co.*, 25 Am. & Eng. R. Cas. 463, 88 Mo. 360.

A road master is not a fellow servant with a laborer engaged under him in removing a wrecked car, and the company is liable for his negligence by which such laborer is injured while so employed. *Hoke v. St. Louis, K. & N. R. Co.*, 25 Am. & Eng. R. Cas. 463, 88 Mo. 360.

Louisville & N. R. Co. v. Bowcock

Plaintiff was assisting in getting a car on the track, and was injured by the breaking of an old and worn rope which was furnished for his use by the company's road master, who was superintending the work. *Held*, that the company was liable. *Galveston, H. & S. A. R. Co. v. Delahunty*, 4 Am. & Eng. R. Cas. 628, 53 Tex. 206.

**Road Master as Fellow Servant.**—A road master is not necessarily a vice principal of a section hand merely because he has the power to employ and discharge section hands working on his train. *Galveston, H. & S. A. R. Co. v. Smith*, 44 Am. & Eng. R. Cas. 598, 76 Tex. 611, 13 S. W. Rep. 562.

A road master negligently misplaced a switch, causing an engine to be overturned, which injured the engineer and fireman. *Held*, that they were fellow servants with the road master, and could not recover against the company. *Walker v. Boston & M. R. Co.*, 1 Am. & Eng. R. Cas. 141, 128 Mass. 8.

A road master in charge of a working train and a working party moved the train so negligently that he brought it into collision with a special train, and a section hand riding upon the working train, but not employed under the immediate eye of the road master, was injured. *Held*, that although the road master had the power to employ and discharge the men on his train, yet in bringing about the collision he acted as a fellow servant of the section hand, and his negligence should not be considered as the negligence of the company. *Galveston, H. & S. A. R. Co. v. Smith*, 44 Am. & Eng. R. Cas. 598, 76 Tex. 611, 13 S. W. Rep. 562.

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LOUISVILLE & N. R. Co.

v.

BOWCOCK.

(*Court of Appeals of Kentucky, June 3, 1899.*)

**Injury to Brakeman—Condition of Track—Assumption of Risk.**\*—A brakeman, in making a coupling at a point not within a yard where trains are made up, assumes the risk of injury from the track not being surfaced up, if the track at such point is in substantially the same condition as similar localities along the road.

**Same—Same—Same.**\*—But where all the filling has been tempo-

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\*See notes at end of case.

## Louisville &amp; N. R. Co. v. Bowcock

rarily removed from between the ties at a switch, a brakeman, in making a coupling at such point, does not assume the risk of injury from such condition of the track, unless he is chargeable with notice of it.

**Coupling Cars—Rules.\***—A brakeman is bound by a rule of the company forbidding brakemen getting between the rails to couple or uncouple cars in motion, if he is chargeable with notice of the rule.

**Same—Same—Notice.**—It is not required that such a rule be read to brakemen, but only that they be given reasonable opportunities to learn the rule.

**Same—Same—Waiver.\***—If, however, such a rule is habitually disregarded by the company or its officers having authority over a brakeman injured while in between the rails coupling moving cars, and he was expected by such officers to make couplings under such circumstances, such rule would be no bar to a recovery for the injury.

**APPEAL** by defendant from Bell county circuit court.  
*Reversed.*

*J. W. Alcorn and C. W. Metcalf*, for appellant.

*Wm. Lowe*, for appellee.

**HOBSON, J.** Appellee was a brakeman in appellant's service. While in the discharge of his duty in making a coupling, he was caught between the cars of the train, and his leg cut off. For this there was a verdict  
*Case Stated.*

and judgment in his favor for the sum of \$5,000.

The railroad company seeks by this appeal a reversal of the judgment, chiefly on the ground that the facts did not warrant a recovery, and that the instructions of the court below did not properly give the law of the case to the jury. The injury occurred at Asher's Mill, which is just south of the station of Pineville. There was a side track there. The train had in it some cars to be left on this side track. Appellee got off at the switch, and opened it, and then walked up by the side of the train to the car next to the tender, to uncouple it, so as to shove it and two other cars onto the side track. When he stepped in between the cars, his lantern was lighted, and hanging on his left arm. The train was moving slowly backwards. He pulled out the pin

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\*See notes at end of case.

## Louisville &amp; N. R. Co. v. Bowcock

with his left hand to uncouple the car, and as he did so his lantern went out. He then started to get out from between the cars, and in doing so stumbled, and the brakebeam of the tender ran upon his left foot. He fell, and was dragged 30 or 40 feet. His leg and ankle were crushed to above the knee joint. It was dark, and he says the cause of his fall was his stepping into a hole in the track after his lantern went out. It is earnestly argued for appellant that it was negligence in appellee, and contrary to its well-known rules, to go in between the moving cars for the purpose of uncoupling them, and that, at any rate, his injury occurred from a risk incidental to the service; the proximate cause of it being his lantern's going out, so as to leave him in the dark, and unable to see how to guide his movements. The cause of the lantern's going out is not explained, but was probably due to his having it on the arm with which he pulled the pin while the train was in motion. On the other hand, it is argued for appellee that the proximate cause of his injury was the fact that the place where he was called upon to discharge his duties was not safe for this purpose, and that his fall was due to the hole into which he stepped in the dark, which defendant should not have suffered to be there. The rule is well settled that in its station yards or yards where trains are made up the railroad company should have its track reasonably safe for the discharge of such duties as its employees are there required to perform, and to this end such places should be surfaced up, and free from holes endangering the safety of its employees in the ordinary discharge of their duties. But this rule does not apply to the track of the railroad at other places than such yards. It is notorious that railroad tracks are not usually surfaced up in this state at side tracks for small stations, mills, etc. There is evidence in this case that the track at this point was in the condition as at other similar places along the road, with no holes in it, except the ends of the ties were not surfaced up. In entering appellant's service appellee assumed the

Injury to Brake-  
man—Condition  
of Track—  
Assumption  
of Risk.



## Louisville &amp; N. R. Co. v. Bowcock

risks ordinarily incidental thereto. This would include risk of injury from the track not being surfaced up if the place where appellee was hurt was substantially in the same condition as similar localities along the road. *Ragon v. Railway Co.*, 97 Mich. 265, 56 N. W. 612; *Batterson v. Railway Co.*, 53 Mich. 125, 18 N. W. 584; 3 *Elliott, R. R.*, §§ 1272, 1296;

Same—Same—  
Same.

2 *Shear. & R. Neg.* § 406, notes. But there was proof for appellee which tended to show that on the day before the accident the section men were at work on the track at this point, and had taken out all the filling or tamping between the ties; that they went away, and left it in this condition, and, after appellee was hurt, came back the next morning, and filled it up again. If all the tamping was taken out from between the ties, it would leave a deep hole there, which would well cause a man to fall if he stepped in it in the dark while uncoupling a moving train. Such a hole would be peculiarly dangerous, because, the track having been theretofore, according to the evidence for appellant, in good condition, appellee would have no reason to apprehend the danger, as the tamping was not taken out when he went over that part of the track on his last trip. In *Railroad Co. v. Kier*, 41 Kan. 661, 21 Pac. 770, a brakeman sued for injuries received from his stumbling while going in to uncouple a moving train. For a long time before the time of his injury the ground where the switch was located had been solid and hard. He was well acquainted with its condition, and on the morning of that day, as he went out, had used the switch in its usual good and safe condition; but before his return the company had deposited about the switch several car loads of cinders, and left them in great heaps and piles upon either side of the track, so spongy and soft that a person stepping upon them would sink into them to a considerable depth. On his return, which was after dark, he stepped upon the ground, in ignorance of its changed condition, and by reason of the cinders tripped, and fell between the cars. The cause of his fall was his sinking in the cinders, which rendered it dangerous for him to discharge his duties

## Louisville &amp; N. R. Co. v. Bowcock

in the usual way at that switch. It was held by the court that it was the duty of the railroad company to keep its track in a reasonably safe condition, and that it was under obligation to its servants not to induce them to work in a place of danger under the notion that it was safe; that the master assumes the duty towards his servant of exercising reasonable care to provide him with a reasonably safe place at which to work, and that, if the dumping of the cinders left the roadbed in a dangerous condition, and Kier, while in the discharge of his duty to uncouple the car, while moving slowly, without any notice of the recent change in the condition of the roadbed, was thrown under the train on account of the dangerous condition of the ground at the switch, the railroad company would be liable. After citing several cases supporting this conclusion, the court says: "Counsel contended that if the plaintiff was entitled to be notified of the changed condition of the roadbed or yard, then every other employee would be equally entitled to like notice, and therefore that the company would be seriously embarrassed in the operation of its road. As we have already decided that a railroad company is liable to any one of its servants operating its road for the negligence of either one of its servants whose duty it is to keep the road in a reasonably safe condition, and who culpably fails to perform such duty, or to give proper warning, we deem it unnecessary in this case to give further or additional reasons for the support of the law as declared by this court. It would seem to us, however, not very difficult or expensive, if a bridge, track, roadbed, or yard of a railroad company is in a dangerous condition, for the foreman having charge of the section or work to place thereon at night danger signals like red lights so as to give warning to all the servants or employees of the company." A similar ruling was made in *Lewis v. Railroad Co.*, 59 Mo. 495, where a deep hole had been dug by the side of the track to set a post a day or two before the accident, and left open so that a brakeman in discharge of his duty, without notice of the danger, stepping into it, stumbled, and, falling between the cars, was injured.

## Louisville &amp; N. R. Co. v. Bowcock

The court said: "The legal implication is that the roads will have and keep a safe track, and adopt suitable instruments and means with which to carry on their business. They can provide all these by the use of the requisite care and foresight, and, if they fail to do so, they are guilty of a breach of duty, and are liable for the consequences. \* \* \* Under this rule it is held that the companies are liable for the existence of all defects which they knew, or by reasonable care and diligence might have known." In this quotation the court used substantially the language of CHIEF JUSTICE BIGELOW in *Snow v. Railroad Co.*, 8 Allen 441, where a brakeman had been injured by reason of a hole in a plank laid down between the rails at a point where a highway crossed the track, he having stepped into the hole, and fallen, in the discharge of his duty, by reason of it.

The removal of all the ballast or filling from between the ties at the switch where appellee was injured made it necessarily dangerous for a man to go in between the cars at that point, while they were moving, to make a coupling, because, if he did not know that the tamping had been taken out, and in moving along with the car should place his foot between the ties in the dark, he would be very liable to stumble and get hurt. Such a condition of the place where he was required to discharge his duty should not have been left without notice to him of the change, because he had a right to assume, until he learned to the contrary, that the place was in its normal or usual condition. If the tamping is removed from such places, and cannot be replaced before dark, either notice should be given to those servants having occasion to use it in discharge of their duties, or a light should be placed there to apprise them of their danger. The duties of a brakeman are peculiarly perilous, and proper regard for human life will not permit that the places where they are to work shall be left in such condition, without their knowledge, as to imperil their lives in the necessary rendition of the services assigned them.

The instructions given on the trial were not in accord

## Louisville &amp; N. R. Co. v. Bowcock

with the principles we have stated. The proof showed that appellee had been in the service of appellant for several years, and was familiar with the track at this point. There was no proof of the existence of any hole or defect in the track for which appellant would be liable if it was in its usual condition. Whether it was in its usual condition, or the tamping had all been taken out from between the ties, with no filling left between them, as above described, the proof was very conflicting. Under the evidence the court should have told the jury that in entering appellant's service appellee assumed all the risks usually incidental to it, and that, if he was caught and injured by reason of the track not being surfaced up, when it was in its usual condition, as it had been theretofore, appellant was not liable; but that if, shortly before the injury, appellant took the tamping from between the ties, and, without notice to him, left it in a more dangerous condition for the necessary discharge of his duties than might be reasonably expected from the exercise of ordinary care on the part of appellant, and that if, by reason of this, the injury occurred, appellee was entitled to recover, unless he failed to use at the time ordinary care for his own safety, and, but for this, he would not have been injured. Ordinary care is such as may be usually expected of persons of ordinary prudence under like circumstances, considering the perils attendant upon the business. On the return of the case to the court below appellant may be allowed to file its amended answer heretofore tendered so as to plead contributory negligence by appellee in going between the cars and uncoupling the train as he did.

Appellant offered in evidence a rule forbidding brakeman getting between the rails to couple or uncouple cars while in motion. Appellee denied knowledge of the rule, and said it was habitually disregarded by appellant.

The rule may be admitted in evidence on Coupling Cars—  
Rules. another trial, for appellee cannot recover if he got between the rails, and so got hurt, in violation of his duty. He was bound by the rule if he knew, or by the exercise

## Notes

of ordinary care ought to have known, it. Appellant was not required to read the rule to him, but only to give him a reasonable opportunity to learn it; and had a right to presume he understood, especially after he had been so long in its service, how he was required to discharge his duties. *Alexander v. Railroad Co.*, 83 Ky. 589, 25 Am. & Eng. R. Cas. 458. If, however, the rule was habitually disregarded by appellant or its officers superior in authority to appellee, and he was expected by his superior officer to go in between the rails, while the cars were in motion, to couple or uncouple them, the rule would be no bar to a recovery in this action. 3 Wood, R. R. § 382; *Railroad Co. v. Foley*, 94 Ky. 220, 21 S. W. 866. The rule may be given in evidence, and the testimony that it was habitually violated, with the assent of the company or its officers in charge of appellee, may also be admitted, and it will then be a question for the jury on all the evidence whether appellee was in the proper discharge of his duty, and free from contributory negligence, in going between the rails at the time in question to uncouple the cars. Judgment reversed, and cause remanded for a new trial and further proceedings not inconsistent with this opinion.

## NOTES.

**Ballasting Side Tracks.**—Employees may be chargeable with knowledge that side tracks are not always perfect; that they are sometimes constructed over ditches or gullies, and are not always ballasted with the same care that main tracks usually are; but railroad companies owe it to their employees to protect them from unnecessary and dangerous pitfalls and unusual conditions. *Ragon v. Toledo, A. A. & N. M. R. Co.*, 91 Mich. 379, 51 N. W. Rep. 1004.

Where a brakeman sues for an injury, and charges the company with negligence in failing to properly grade and ballast a side track, so as to give a solid surface and secure footing, he is presumed to be aware of and to take the risk of such defects, and the company is not liable. *Batterson v. Chicago & G. T. R. Co.*, 53 Mich. 125, 18 N. W. Rep. 584.

## Notes

Railroad tracks are not ballasted for the purpose of making them safe for the employees of the company to walk thereon, but to make them firm and safe for the passage of trains; and the failure of the company to ballast a side track used for stowing cars and making up trains is not a breach of any duty it owes its employees. *Finnell v. Delaware, L. & W. R. Co.*, 129 N. Y. 669, 29 N. E. Rep. 825, 3 Silv. App. 643, 42 N. Y. S. R. 354; *reversing* 36 N. Y. S. R. 1020; *Philadelphia, etc., R. Co. v. Schertle*, 97 Pa. St. 450, 2 Am. & Eng. R. Cas. 158.

As to employees, railroad companies are only required to construct and keep such side tracks as are in general use. *Atchison, T. & S. F. R. Co. v. Alsdurf*, 47 Ill. App. 200. See also *Penna. Co. v. Hankey*, 93 Ill. 580.

The failure to ballast a storage track is not negligence. *Pennsylvania Co. v. Hankey*, 93 Ill. 580.

That the servant assumes the risk of unballasted side tracks, see *Batterson v. Chicago, etc., R. Co.*, 53 Mich. 125, 8 Am. & Eng. R. Cas. 128; *Clark v. Missouri Pac. R. Co.*, 48 Kan. 654.

Where there is no need for unfilled spaces, it is negligence to leave the spaces between the ties unballasted. *Illinois C. R. Co. v. Cozby*, 69 Ill. App. 256.

And the company must use reasonable care to keep such spaces near switches filled. *Toledo, etc., R. Co. v. Frick*, 14 Ohio C. C. 453, 8 Ohio C. D. 28.

Plaintiff's intestate, a freight conductor in the employment of the defendant, was killed in a collision between the freight train in his charge, and a freight car which had drifted from a side track. The court against the objection of the defendant, permitted evidence as to the defective construction of the side track and the failure of the defendant to employ stop blocks or proper means for blocking the cars when upon the side tracks, to be introduced. The jury were instructed that they must say "whether the siding was constructed in accordance with scientific railroad construction, and whether its construction, with respect to the stop blocks, or securities against a car being blown out upon the main track, the company exercised ordinary care." *Held*, that as there was no question as to the side track having become defective after its construction, but the question being whether the company exercised ordinary care in its construction and whether it was constructed according to scientific principles, the instruction was erroneous, there being no rule of law restricting the company in the manner of constructing its side tracks where the safety of passengers and of the public is not involved, and the hazards incidental to such tracks as constructed, being assumed by the brakeman and others employed thereon. *Twitchell v. Grand*

## Notes

Trunk R. Co., 39 Fed. Rep. 419; following *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189.

**Injuries to Employees—Knowledge of Rules.**—See *Indiana, I. & I. R. Co. v. Bundy*, 14 Am. & Eng. R. Cas., N. S., 660 and *notes*, 677.

**Master and Servant—Waiver of Rules.**—The rules of a railroad for the guidance of its employees in the discharge of their duties will be deemed to have been waived when they have been openly and notoriously disobeyed by them for a long time. *Lowe v. Chicago, etc., R. Co.*, 89 Iowa 420; *Spaulding v. Chicago, etc., R. Co. (Iowa)*, 67 N. W. Rep. 227; *Fish v. Illinois Cent. R. Co.*, 96 Iowa 702; *Atchison, T. & S. R. Co. v. Slattery*, 57 Kan. 499, 46 Pac. Rep. 941; *Fray v. Minneapolis, etc., R. Co.*, 30 Minn. 234; *Louisville & N. R. Co. v. Reagan*, 96 Tenn. 128, 33 S. W. Rep. 1050; *Galveston H. & S. A. R. Co. v. Slinkard (Tex. Civ. App.)*, 39 S. W. Rep. 961, 2 Am. Neg. Rep. 654.

And an injured employee is not chargeable with contributory negligence in violating a rule of the company, where it appears that such rule was wholly and habitually disregarded by employees with the knowledge and consent of the company. *Alkyn v. Wabash R. Co.*, 41 Fed. Rep. 193, 23 Ohio L. J. 151; *Louisville & N. R. Co. v. Perry (Ala.)*, 6 So. Rep. 40.

And the fact that the employee has signed an agreement to comply with a rule, and that he would take upon himself all risk of its violation, does not preclude him from showing that the company had waived or abandoned it. *Northern Pac. R. Co. v. Nickels*, 53 Am. & Eng. R. Cas. 388, 50 Fed. Rep. 718, 4 U. S. App. 369, 1 C. C. A. 625; *Barry v. Hannibal & St. J. R. Co.*, 98 Mo. 62, 11 S. W. Rep. 308; *Smith v. Memphis & L. R. R. Co.*, 18 Fed. Rep. 304; *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. Rep. 924.

But it makes no difference that other employees frequently or customarily disregarded the rule, unless the company, with knowledge of their practice, acquiesced in it in a way to sanction it, or practically to abrogate the rule. Nothing less would relieve the plaintiff from abiding by his uniform orders. *Sloan v. Georgia Pac. R. Co.*, 44 Am. & Eng. R. Cas. 556.

And the mere custom of railroad employees to disregard a plain rule for their conduct, not brought home to some person whose duty it is to take action and who is authorized to bind the principal, does not affect an abrogation of the rule. *Alabama G. S. R. Co. v. Roach*, 110 Ala. 266, 20 So. Rep. 132. And it must be shown that the custom was known to the officer charged with the enforcement of the rule. *O'Neill v. Keokuk E. D. M. R. Co.*, 45 Iowa 546.

**Illustrations.**—If a brakeman, under the directions of the conductor of his train, and in the presence and with the knowledge of the

## Notes

division superintendent of the road, who has charge of its management and directs the employees of the company in the performance of their duties, opens and adjusts a switch for a long time in a different manner from that prescribed by the established rules, such rules are deemed changed or modified as to the brakeman. *Kansas City, Ft. E. G. R. Co. v. Kier*, 38 Am. & Eng. R. Cas. 119, 41 Kan. 661, 671, 21 Pac. Rep. 770.

Contributory negligence cannot be imputed to the plaintiff on account of a violation of the rules in leaving his post of duty, when it appears that by the general practice on the defendant's train, without objection from the conductor, brakemen went into the caboose where he was, during inclement weather, when their duties did not require their presence on the top of the cars, and remained until he gave them orders to go to their cars; and that the plaintiff, on the occasion when he was injured, had thus been in the caboose with the conductor, and was injured while attempting to get on top of his car in obedience to the order of the conductor. *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. Rep. 252.

Plaintiff's evidence tending to show that, before he went in between the cars, he had attempted to couple them with a stick, signaled the engineer to stop the train, and went in after the cars had stopped; evidence that this was in accordance with the custom and practice, when a coupling cannot be made with a stick, is relevant and admissible, as showing that the rule was not imperative, or was sometimes waived. *Hissong v. Richmond & D. R. Co.*, 91 Ala. 514.

**Evidence Inadmissible to Show Custom to Disregard Rules.**—In *Gordy v. New York, P. & N. R. Co. (Md.)*, 23 Atl. Rep. 607, it was held that where the rules of a railroad company furnished employees provide that brakeman must not leave their brakes while the train is in motion, and that the post of the rear brakeman is on the last car which he must not leave except to protect the train, in an action for injury to a rear brakeman sustained while climbing from the inside to the top of the rear car, evidence is inadmissible to show that it was customary for the rear brakeman to ride inside the car.

**Waiver of Rule by Conductor.**—A rule of a railroad company agreed to by the plaintiff (an employee) may be waived or abrogated for the company by the conductor making an order contrary to such rule, when it was the duty of the plaintiff to obey such order. *Mason v. Richmond & D. R. Co.*, 53 Am. & Eng. R. Cas. 183, 111 N. Car. 482, 16 S. E. Rep. 698.

But see *Russell v. Richmond & D. R. Co.*, 47 Fed. Rep. 204, where a brakeman on a freight train, who was killed while coupling cars, was charged with contributory negligence in violating a rule in making the coupling by hand instead of with a stick. To avoid this,



## Louisville &amp; N. R. Co. v. Ross

plaintiff introduced evidence that the brakeman and others habitually coupled and uncoupled cars without the use of a stick, within the knowledge of the conductors. *Held*, that the disregard of their duty by the conductors could not render obsolete a regulation of the company; and a conductor on a freight train does not so far represent the company as to authorize him to rescind the rules of the company. *Russell v. Richmond & D. R. Co.*, 47 Fed. Rep. 204. See also *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. Rep. 252.

## LOUISVILLE &amp; N. R. Co.

v.

ROSS.

*(Court of Appeals of Kentucky, March 29, 1900.)*

**Defective Tracks—Care Required of Master.\***—A railroad company, as a master, must use ordinary care to discover defects in and to repair its tracks.

**Same—Care Required of Servant.†**—If a railroad employee injured through a defect in the roadbed had opportunities to discover it equal to those of the servant charged with the duty of discovering or repairing such defects, he cannot complain that it was not discovered and repaired by the master.

**Tracks in Switch Yards—Care Required of Master.‡**—It is the duty of a railroad company to have the tracks in its switch yards surfaced up and free from holes, and in reasonably safe condition for switchmen working in such yards.

**APPEAL** by defendant from Jefferson county common pleas division circuit court. *Affirmed.*

*Lyttleton Cooke and Edward W. Hines*, for appellant.

*Matt O'Doherty and R. C. Davis*, for appellee.

**WHITE, J.** The appellee, James Ross, brought this action in the Jefferson circuit court against appellant for dam-

\*See note, 12 Am. & Eng. R. Cas., N. S., 668, notes, 11 *Id.* 863.

†See notes, 11 Am. & Eng. R. Cas., N. S., 484 *et seq.*

‡See note, 12 Am. & Eng. R. Cas., N. S., 632.

## Louisville &amp; N. R. Co. v. Ross

ages for personal injuries. Appellee alleged that he was in the employ of appellant as switchman, and while engaged at his work he was run over by a train, and seriously injured,—his hip dislocated and his body bruised. The immediate cause of the injury is alleged to be that appellee was engaged in switching cars onto a side track in appellant's switch yard, called "Glass-Works Track," and, while running in front of the train to get a pin out of one car, which had to be removed, and to which car they were to couple the train, by reason of the defective and insufficient ballast (being clay) between the rails of the track, and its being covered with snow, appellee slipped and fell on the track, and, before he could get up, was run over and injured. The negligence complained of is the defective ballast between the rails; the appellee alleging it to have been clay, and about a foot wide on top, and sloping towards either rail, and alleging that it should have been of some other material than clay, and at least should have extended level to either rail. Appellee also alleged his want of knowledge of the defective condition of the track at that point. The answer constitutes a denial of all acts or omissions alleged to be negligence, and pleads contributory negligence,—that the accident occurred in the daytime, and that appellee did see and know, or by the exercise of the slightest care could have seen and known, of the condition of the track, and voluntarily assumed the position of danger, if it was in fact dangerous. On this issue a trial was had, and a verdict and judgment for appellee was rendered for \$3,100; and, appellant's reasons and motion for new trial having been overruled, this appeal is prosecuted.

The court, on the trial, instructed the jury as follows: "The court instructs the jury that if they shall believe from the evidence that the switch or siding in defendant's yard where the plaintiff was injured was insufficiently ballasted, and that by reason thereof it was dangerous to the employees

Louisville &amp; N. R. Co. v. Ross

of defendant necessarily using the same in coupling cars, and that because of the insufficient ballasting the plaintiff received the injuries of which he complains, and that the plaintiff did not know of the insufficient ballasting, and did not have an equal opportunity with the employees of the defendant who were charged with the duty of looking after its tracks to know of its condition, and, further, that the defendant, or its agents or employees who are charged with the duty of looking after its tracks, knew or might know of its insufficient and dangerous condition by the exercise of ordinary care, if such was its condition, then the law is for the plaintiff, and the jury should so find, provided that they shall further believe from the evidence that the plaintiff did not contribute to cause his injuries by negligence upon his part, but for which he would not have been injured." The counterpart of this was given as to the condition of the track, plaintiff's knowledge, or his equal means of knowledge with defendant's servants, whose duty it was to look after the track, and of the servants' knowledge, who knew, or by the exercise of ordinary care would have known; and the jury were told that, unless they believed all those things, they should find for appellant. An instruction on contributory negligence and as to the measure of damages, as well as proper definitions of "ordinary care" and "negligence" were given. By these instructions given, the jury were required to find, and by their verdict they did find, that the track was insufficiently ballasted; that appellee did not in fact know of this defect, and did not have an equal opportunity with the employees of appellant whose duty it was to look after the track to know of its condition. And, further, the jury find that the employees whose duty it was to look after the track knew, or by the exercise of ordinary care could have known, that the track was insufficiently ballasted; and, further, that the defective condition of the track was the cause of the injury, without any contributory negligence by appellee. It is insisted for appellant that an instruction should have been given, telling the jury that appellee, by

## Louisville &amp; N. R. Co. v. Ross

the exercise of ordinary care, could have seen or known of the condition of the track, and, having seen or known of the condition, or having had a reasonable opportunity by the exercise of ordinary care to see or know of the condition, the risk was assumed by him, and he cannot recover.

It is well settled that the master owes it to his servant to furnish him reasonably safe machinery, and a reasonably safe place in which to work. This duty is not only one at the beginning of the business or employment,

but remains throughout the service. If the machinery or place is reasonably safe at the beginning, the obligation is not discharged, but the master must use ordinary care to keep the appliances and place reasonably safe. It is known of all men, by common experience and observation, that railroad tracks, as well as machinery, need attention and repair, and this duty is on the master. The servant, presumably knowing of this duty of the master, may reasonably expect its discharge, and he may act with the expectation that the master has performed his duty. However, when the servant becomes aware that there exist defects, he then assumes the risks of those defects, if he remains in the service, unless the master assumes the risk by a promise to repair. If the defects be not known to the servant injured thereby, yet, if he has opportunities to discover the defect equal with the servant whose

Defective  
Tracks—Care Re-  
quired of Master.

duty it is to repair or look after such, then the servant injured cannot complain that it was not discovered and remedied. This is true, because he could have made the discovery, and should have done so, as readily and as soon as the servant charged with the duty to repair. We are of opinion that to have given the instruction asked for by appellant would have required of appellee to have assumed the duty imposed on the master; *i. e.* to exercise ordinary care to discover a defect in the place where appellee worked. This duty rests on appellant. In the case of Railroad v. Foley, 94 Ky. 220, 21 S. W. 866, this court said:

Same—Care Re-  
quired of Servant.

"The lower court therefore properly instructed the jury that

Louisville &amp; N. R. Co. v. Ross

if the injury was caused by improper or defective appliances furnished plaintiff by defendant with which to perform the duties required of him, and defendant knew or might have known of their condition and character by use of ordinary care, and plaintiff did not know thereof, the law was for him, and the jury should so find. \* \* \* The rule requiring an employer to provide reasonably safe and suitable machinery and appliances for use of employees, and to keep them in reasonable repair while being used, is so just and fair that it has never been called in question by this court. But if an employer may in every case escape liability for an injury to a subordinate employee by reason of defective machinery and appliances provided for his use, merely because the latter does not show he exercised care and diligence to discover the character and condition thereof, the rule would not amount to much, as either an incentive to the employer to do his duty, or protection to the employee against personal injury. The limit of injury in such cases as this is whether, as a matter of fact, the employee did, before exposing himself to danger, know the machinery or implements causing the injury to be defective." If appellee had the same or an equal opportunity as appellant to discover the defect, it was his duty, by the instruction given, so to do; and, if he failed in this, he could not recover. As the duty to furnish reasonably safe appliances, machinery, and place to work is a continuing duty on the master, it seems to us that the instruction given by the court correctly states the law of the case. If appellee knew of the defect, he could not recover. If he had an equal opportunity with those whose duty it was to look after such, he must know, and could not recover. There must in fact be the defect, or he could not recover, and, finally, if he contributed to his injury by negligence he could not recover. In the case of *Railway Co. v. McKinley* (Ky.), 33 S. W. 186, the court said: "The servant, when he takes employment, submits himself to all reasonable demands of his employer, not only as to the work

Louisville &amp; N. R. Co. v. Ross

to be done by him, but as to the manner of doing it, as well, and he may fairly infer that the tools furnished him in the prosecution of his daily work are reasonably safe for the purpose for which they are used. This much, at least, every employer should be understood to guaranty to his servants, and especially when employed in so dangerous a business as blasting stone by the use of dynamite. It is hardly accurate to say that the servant so employed assumes the risk incident to his employment. It may be the law to say that he assumes the risks necessarily incident to his employment, when this risk is considered with reference to the primary duty of his employer to furnish tools, and, in fact, all other instruments, means, and agencies necessary to be used in the prosecution of his business, reasonably safe and secure for the purpose used. But this duty of the employer is the first and primary duty, and should at all times, by the trial courts, be kept steadily in view, and no construction of the law should be tolerated that needlessly exposes the servant to danger in the prosecution of the business of the master. Humanity itself demands this much consideration by the employer for the lives and safety of his servants, and the greater the danger to the servant, the greater should be the care and caution demanded by the law of his employer." The same rule that is so well settled in this state as to machinery, tools, and appliances, and the duty of the master in respect thereto, applies to the place where the servant is assigned to work. In the case of *Railroad Co. v. Bowcock* (Ky.), 51 S. W. 580, this court said: "The rule is well settled that in its station yard, or yards where trains are made up, the railroad company should have its track reasonably safe for the discharge of such duties as its employees are there required to perform; and, to this end, such places should be surfaced up, and free from holes endangering the safety of its employees in the ordinary discharge of their duties."

The testimony in this case shows that this place where appellee received his injury was in appellant's yards in the

## Wagen v. Minneapolis &amp; St. L. R. Co

city of Louisville, and is used every day. It is clear that, if this be true, it was appellant's duty to have kept the track surfaced up and free from holes, and in reasonably safe condition for the switchmen to work in. We are of opinion that the instructions given fairly state the law of the case, and that those refused were properly so. The verdict cannot be said to be flagrantly against the evidence, nor is the amount of the verdict excessive. There appears no error prejudicial to appellant, and the judgment is affirmed, with damages.

Tracks in Switch  
Yards—Care  
Required of  
Master.

Du RELLE and HOBSON, JJ., dissenting.

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WAGEN

v.

. MINNEAPOLIS & ST. L. R. Co.

(*Supreme Court of Minnesota, May 31, 1900.*)

**Master and Servant—Liability for Injury to Volunteer.\***—A person who voluntarily assumes to act as a baggage man on a railroad train cannot recover for injuries received by defective appliances.

**Same—Acceptance of Service—Sufficiency of Evidence.**—Evidence examined, and *held* that the acts of plaintiff were not of such continuous, definite, and prominent character as to imply notice of and acceptance of such services by defendant.

**Case at Bar.**—*Held*, that the evidence does not justify the verdict. (Syllabus by the Court.)

**APPEAL** by defendant from Blue Earth county district court. *Reversed.*

*Albert E. Clarke*, for appellant.

*Brown & Abbott*, for respondent.

**LEWIS, J.** This action was brought by plaintiff against defendant to recover damages alleged to have been caused by

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\*See notes at end of case.

Wagen v. Minneapolis & St. L. R. Co

a defective handhold on a baggage car giving way, thus throwing plaintiff from the car while in motion; the plaintiff claiming to be discharging the duties of train baggage man. A verdict was returned for the plaintiff in the trial court, and defendant appeals from an order denying its combined motion for judgment notwithstanding the verdict and for a new trial. It is necessary to consider only one question, *viz.* was the verdict justified by the evidence? Appellant denies that the respondent was in its employ at the time he received the injuries, and insists that, if he was injured as claimed, he was at that time acting as a mere volunteer; the relation of master and servant in no sense existing between himself and the defendant. In the discussion of this question we shall assume that the so-called Wisconsin, Minnesota & Pacific Railroad was operated by defendant, and a part of its system of railway. In order that the case may be properly understood, it will be necessary to state, in substance, the evidence relied upon by respondent. The plaintiff testified that he had been employed by defendant for about nine years as baggage man at defendant's station in Mankato; that he was under the control of the station agent; that it was the practice of defendant to run Sunday excursions from time to time from Mankato to a point near Waterville, some 30 miles east on defendant's line. The trains for this purpose were made up at Mankato, consisting of a few passenger coaches and a baggage car, and a freight crew was employed to take out the train. The first one of these excursions took place in September, 1896. Respondent went upon this trip, and acted as baggage man in handing bundles out to the people. There was no baggage, but on the return he checked bicycles which were received at Waterville. Says he stood in the door, ready to receive baggage if there had been any. During 1897 there was an excursion to St. Paul, and plaintiff says he took his position as before, and acted as baggage man, taking care of all the baggage offered. On this trip he says he wore no uniform, and did not return with the train from St. Paul to Waterville. Two other excursions took place to Waterville



## Wagen v. Minneapolis &amp; St. L. R. Co

in 1897, at which plaintiff says he acted in a similar capacity. On the 28th of August, 1898, an excursion was arranged for St. Paul and Minneapolis, and plaintiff says the train was made up of six or seven coaches and a baggage car; that when the train was drawn up to the depot he swept out the cars, and placed ice in the water casks. When the train was ready for passengers, he took his position at the door of the baggage car, and received and checked two bicycles. Says he took along baggage checks for use on the trip. Took on a bicycle at a station, and upon reaching Waterville took on the newsboy's chest. Says that he stood at the door at every station, ready to receive baggage; that the train master saw him in the baggage car, and rode with him part way to Minneapolis; that he helped to light up the lamps on the way home, at the conductor's request. Says the train master noticed his uniform on the way back, and asked him if he would like to be a brakeman. Plaintiff had on a fireman's uniform, with a common railroad cap. He thought the trainman saw him acting as baggage man. Admits that he had secured a pass for the trip for himself and wife, and that the conductor took it up on the way up, and that it was canceled. Plaintiff's account of the accident is as follows: At a point about two miles from Waterville, on the return trip, he opened the door, to see if the train was approaching a station, and took hold of the iron rod, which runs along the side of the car over the door, and leaned out to look forward; that the screws which held the rod pulled out, and he fell out of the door, and was injured. Plaintiff states that the station agent at Mankato told him to go upon that train as baggage man. No baggage man was provided for these excursions, and the crew consisted of a conductor, engineer, fireman, and two brakemen. It was a part of plaintiff's duties, as helper at the station, to sweep out and provide ice. It does not appear from plaintiff's statement that either the conductor, or train master, or any one else with authority, employed him to go upon the train, or to act as baggage man. The agent at Mankato had no such authority.

## Wagen v. Minneapolis &amp; St. L. R. Co

He was not dressed in a railroad uniform. The amount of baggage handled did not require such continuous service as would be likely to attract the attention of the conductor and train master. The conductor and train master testify that they had no knowledge that plaintiff was acting as train baggage man; that they did not see him take his place at the door of the car, or assume to perform any such duties. It also appears from the evidence that the baggage car in question was what is known as a "combination car," one end being used for baggage and train supplies, tools, etc., and the other end filled with regular coach seats, and generally used as a smoking department. This car was provided with benches in the baggage end, to be used by passengers, and was utilized on this occasion, because there was shortage of coaches. If the station agent had no authority to direct plaintiff to go upon the train in the capacity of baggage man, he cannot recover, conceding that defendant was negligent in reference to the handhold, unless the relation of master and servant arose by implication. *Church v. Railroad Co.*, 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861; *Willis v. Railway Co.*, 72 Mich. 160, 40 N. W. 205. If the plaintiff volunteered to check the bicycles and handle bundles, and was injured while so engaged, defendant is not liable, subject to the above exception. *Church v. Railroad Co.*, *supra*; *Evarts v. Railway Co.*, 56 Minn. 141, 57 N. W. 459, 22 L. R. A. 663. Plaintiff admits this to be the law, and the court so instructed the jury. But it is argued that the defendant knew that plaintiff was acting as baggage man on that train, and permitted him to so act, and accepted his services, and the relation of master and servant became established by the conduct of the parties. Some attempt was made to show that the conductor and train master saw and knew what plaintiff was doing, and assumed to direct him, but the only positive statement is that the conductor ordered

Master and Servant—Liability for Injury to Volunteer.

Same—Acceptance of Services—Sufficiency of Evidence.

## Notes

plaintiff to light some of the lamps. It does not appear that even this was the day of a train baggage man. The conductor and train master were the only persons who had authority to direct the movements of the train, and there is no evidence that they had knowledge that plaintiff was acting as he claims. Taking the view of the evidence most favorable to the plaintiff, we are of the opinion that the plaintiff was a mere volunteer, acting without authority, and that such acts were not of such continuous, definite, and prominent character as to imply that the defendant had notice of the same, and accepted such services. In other words, the services performed by plaintiff were not sufficient to raise by implication the relation of master and servant. Order reversed, and new trial granted.

Case at Bar.

## NOTES.

**Liability for Injury to Volunteer Servant.**—A mere volunteer cannot recover damages he may have sustained by the carelessness of the servants of the person whom he has volunteered to aid. *Everhart v. Terre Haute and Indianap. R. R. Co.* (Ind.), 4 Am. & Eng. R. Cas. 599. See also *Rhodes v. Ga. R. & B. Co.* (Ga.), 41 Am. & Eng. R. Cas. 302; *Blair v. Grand Rapids, etc., R. Co.* (Mich.), 24 Am. & Eng. R. Cas. 430; *Osborne v. Knox & L. R. Co.*, 68 Me. 49; *New Orleans, etc., R. Co.*, 48 Miss. 112; *Flower v. Pennsylvania R. Co.*, 69 Pa. 210; *May v. Texas & P. R. Co.*, 63 Tex. 77.

In *Church v. Chicago, M. & St. P. R. Co.* (Minn., June 22, 1892), 52 N. W. Rep. 647, a construction train of defendant, in charge of a conductor, having pulled into a station, the conductor temporarily left the train to attend to his usual duties at the station, leaving the trainmen to do some switching, so as to transpose some of the cars; one of the brakemen, called "head brakeman," having charge of the switching movements of the train. At the request of this "head brakeman," the plaintiff, a bystander at the station, got on the cars to assist in the switching, and while doing so sustained injuries caused by the movement of certain car trucks, which were loaded on one of the cars, and which were not properly blocked. *Held*, that the brakeman had no authority to employ additional men to assist in switching. The fact that the existing force might have been

Notes

sufficient to do the work did not, under the circumstances, give any implied authority to do so; that, if any one on the ground such authority, it was the conductor. The plaintiff was a mere volunteer, and assumed all the risks of the situation. The court said: "In doing what he did the plaintiff was therefore a mere volunteer, and as such assumed all the risks incident to the position. The defendant did not bear to him the relation of master or employer, and owed him no duty as such. *Flower v. Railroad Co.*, 69 Pa. St. 402; *Sherman v. Railroad Co.*, 72 Mo. 62, 4 Am. & Eng. R. Cas. 589; *Wells v. Railway Co.*, 82 Ga. 156; *Everhart v. Railway Co.*, 78 Ind. 404, 4 Am. & Eng. R. Cas. 599; *Rhodes v. Banking Co.*, 84 Ga. 320, 4 Am. & Eng. R. Cas. 302; *Railway Co. v. Lindley*, 42 Kan. 714, 41 Am. & Eng. R. Cas. 72. Counsel for plaintiff has cited no case which sustains his contention in this case. Many of those which he cites have no bearing whatever upon the question here involved. There are cases which hold that, where a regular brakeman is absent, and the proper and safe management of the train so requires, the conductor in charge has authority to supply the place of the absent brakeman. Such, for example, are the cases of *Sloane v. Railway Co.*, 62 Iowa 728, 11 Am. & Eng. R. Cas. 145, and *Railway Co. v. Propst*, 83 Ala. 518. And if any sudden or unexpected emergency should arise, such that the safety of the train demanded an additional force of brakemen, probably it would be held that it was within the implied authority of the conductor to employ them. But the cases are clearly distinguishable from the present, where a regular brakeman, without the knowledge of and without authority of the conductor in charge of the train, and in the absence of any emergency, assumed to call upon a bystander to assist in something. Another line of cases cited by counsel is also clearly distinguishable from the present one. They are those where one employs the servants of another at their request for the purpose of conducting his own business or that of his master. Such is the case of *Wason v. Railway Co.*, 65 Tex. 577. The case of *Railway Co. v. Wason*, 43 Ohio St. 224, 21 Am. & Eng. R. Cas. 501, is also referable to the same class. See, also, *Holmes v. Railway Co.*, L. R., 4 Exch. 211, affirmed L. R., 6 Exch. 123. The decisions in this class of cases are placed upon the ground that, though performing a service beneficial to both, the party is doing so in his own behalf, and not as the agent of the company, and is entitled to the same protection against its negligence as if attending to his own private affairs. See, also, *Thomp. Neg.* 1045, and cases cited. Neither is the case of *Wason v. Water Co.*, 71 Wis. 553, so much relied on by counsel, particularly in point. The question there arose merely on demurrer to the complaint, and the decision is really made to rest upon the

## Notes

fact that the complaint alleged that the person who employed the plaintiff to assist was at the time the superintendent having charge and control of the work."

The plaintiff was requested by a brakeman of the defendant company to ascend a moving car of the defendant and set a brake, which he did, and while so engaged he was injured by other servants carelessly running other cars against the one he was upon. *Held*, That he could not recover of the defendant the damages he had sustained. *Everhart v. Terre Haute and Indianap. R. R. Co. (Ind.)*, 4 Am. & Eng. R. Cas. 599.

In *Blair v. Grand Rapids and Indiana R. Co. (Mich.)*, 24 Am. & Eng. R. Cas. 430, it appeared that A., who was not an employee of defendant railroad company, was requested by a watchman to go up the track to a bridge and notify the conductor of an approaching train that there was a broken rail on the track, and, being anxious to prevent loss of life, A. did as he was bid, and signalled the train to stop as directed. The conductor stopped his train, but started on again, and while the cars were running at about four miles an hour A., fearing that his signal had not been understood, attempted to get on the train and speak to the conductor, when he was thrown off and injured.

In delivering the opinion, the court said: "We must \* \* \* regard the case upon the facts stated as one in which the service attempted, and which resulted so disastrously to the plaintiff, was voluntarily assumed upon his part, and, therefore, necessarily at his own risk."

Where a shipper of stock was on a freight train accompanying two loads of his stock, which were being transported to market, and the train had attached to it a caboose for the shippers on the train to ride in, and, while the train was stopping at a station, the conductor addressed the shipper as follows: "You get on top, and help signal, until the last load of hogs comes up, and we will water them,"—and the shipper voluntarily obeyed the order or direction, and got upon the train moving backward, and while on the top of the train, near to the end of a car, watching a brakeman trying to make a coupling, was severely injured by a sudden forward motion or jerk of the train, without any signal thereof, *held*, that as the shipper voluntarily placed himself in a position of known danger, and, as he was not upon the top of the train to look after or care for his stock, the railroad company is not liable in damages for his injuries. *Atchison, Topeka & Sante Fe R. Co. v. Lindley (Kan.)*, 41 Am. & Eng. R. Cas. 72.

A boy 13 years of age, who at the request of a railroad employee assists in moving a car upon the railroad track, is not a fellow serv-

## Notes

ant of such employee, but is a mere volunteer. *Rhodes v. Georgia Railroad & Banking Co. (Ga.)*, 41 Am. & Eng. R. Cas. 302.

In *Mayton v. Texas & Pac. R. Co.*, 63 Tex. 77, it is held that where a person volunteers to assist the employees of a railway company in managing its cars, and is injured by the train, such person, in respect to the liability of the railway company for the injury, stands in the same position as those with whom he associates himself.

But where one assists the servants of another at their request for the purpose of expediting his own business or that of his master he is not a mere volunteer, and may recover for injuries sustained through the negligence of such servants. See *Eason v. Sabine, etc., R. Co. (Tex.)*, 6 Texas Law Rev. 178, where it appeared that B. having freight to load on a railroad employed A. to do that work. The cars on which the freight was to be loaded were not conveniently located, and a request was made by the conductor that the cars be placed in a convenient place. This request was conceded, but being short of brakemen the conductor requested A. to couple the cars, while doing which he was injured through the negligence of the engineer. *Held*, A. was entitled to recover damages of the company. See also *Wright v. Loudon & N. W. R. Co.*, L. R. 1 Q. B. Div. 252; *Railroad Co. v. Bolton*, 43 Ohio St. 224, 21 Am. & Eng. R. Cas. 501. In the last case it appeared that the plaintiff was a passenger on defendant's railroad, on a car northward bound. The railway was a single track, with occasional side tracks for the passage of cars moving in opposite directions. The north-bound car having been drawn beyond the side track, where it was to have met the south-bound car, it became necessary to push it back to the side track, so that the cars could pass and each proceed to its destination. At the request of the driver of the north-bound car, the plaintiff assisted him in pushing the car back to the side track. While so engaged, without fault on his part, he was injured by the carelessness of defendant's driver on the south-bound car. *Held* (1) the plaintiff did not engage in the service of defendant as a mere volunteer; (2) under the circumstances the plaintiff cannot be considered as a fellow servant with the driver of the south-bound car; (3) in the case stated the doctrine of respondent superior applies.

**Liability for Injury to Employee Voluntarily Acting outside Scope of Duties.**—*Whilton v. South Carolina & G. R. Co. (Ga.)*, 14 Am. & Eng. R. Cas., N. S., 776, and *note*, 779.

Weisel v. Eastern Ry. Co. of Minnesota

WEISEL

v.

EASTERN RY. CO. OF MINNESOTA.

*(Supreme Court of Minnesota, April 19, 1900.)*

**Injury to Employee—Coal Falling from Car—Proximate Cause.\*—** Plaintiff, a common laborer, in the line of his duty, was at work for defendant putting a hose upon the tender of an engine, which was loaded with coal, and standing still. At the same time another servant was standing upon the loose coal on the tender to receive the hose from his fellow servant on the ground, when a lump of coal was dislodged from the tender, and fell upon and injured the plaintiff. *Held*, upon a claim that defendant was negligent in overloading the engine with coal, and thereby responsible for plaintiff's injury, that its acts in this respect were not the proximate cause of the accident, and did not constitute actionable negligence for which a recovery can be had.

**Same—Railroad Hazards—Fellow-Servant Act.†—** Under the facts in this case the damages to which plaintiff was subjected when he was injured were not peculiarly and distinctively railroad hazards, and the injuries caused by the negligence of his fellow servants would not entitle him to recover therefor from his employer.

(Syllabus by the Court.)

APPEAL by defendant from Carlton county district court.  
*Reversed.*

C. Wellington and J. A. Murphy, for appellant.

Windom & McMahon and O'Brien & Vaughn, for respondent.

LOVELY, J. This action is for injuries received by plaintiff while at work as a common laborer in and about

\*See generally *Ayers v. Rochester Ry. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 165, and *note*, 160 *et seq.*

†See generally *Keatley v. Illinois Cent. R. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 1, and *extensive note*, 9 *et seq.*

Weisel v. Eastern Ry. Co. of Minnesota

defendant's gravel pit on its railroad near Nickerson, in this state. He had a verdict. Defendant moved for a new trial upon a settled case.

Case Stated.

The motion was denied by the trial court, from which order defendant appeals, and brings the whole record into this court for review.

The plaintiff was one of a crew of men attending upon a steam shovel in the gravel pit, which was being operated with the customary equipments for loading and hauling gravel from the pit to the main line of defendant's road. At the time when plaintiff was injured he had been at work four or five days performing such ordinary and common duties of his employment as were required, among which was the aid he was required to give in the task of transmitting water from a locomotive (brought into the pit for that purpose) to the steam shovel, in which particular service he received his injuries. The steam shovel had to take the water it used from a locomotive, there being no other means of supply at the pit, and the locomotive furnishing it would run into the pit near the shovel, a hose would be attached to the locomotive, and from thence conducted to the boiler of the steam shovel, and, with the aid of a siphon attachment, when this connection was made the requisite amount of water would, under steam pressure, be forced from the locomotive to the shovel. In pursuance of the usual custom at the time in question, the locomotive, with its tender loaded with coal, came into the pit to supply the shovel, and stopped on the track, where it remained stationary until after the injury. It then became the duty of plaintiff, with the assistance of another laborer, to take up the hose with the siphon attached, and hand it to another employee, one William Dunn, who at this time stood on the loose coal upon the tender. In lifting the hose from the ground to Dunn, and at the moment when it was being handed up to the latter, a piece of coal was dislodged from the tender, and fell upon the plaintiff, knocking out two of his teeth and loosening two others. It is for this injury inflicted in this manner that the



*Weisel v. Eastern Ry. Co. of Minnesota*

verdict was recovered, and the contention for plaintiff in support of the verdict is: (1) That by the negligence of defendant in overloading the tender the plaintiff sustained his injury; (2) that the acts of other servants in dislodging the coal, if contributing to or occasioning his injury, were acts within the remedy of the fellow-servant law of this state (chapter 13, Gen. Laws 1887; section 2701, Gen. St. 1894). Unless the dislodgment and fall of the coal upon plaintiff was caused either by the acts of Dunn alone or in connection with the movements of plaintiff and his fellow laborer on the ground, it is not obvious what could have been the immediate or direct force that caused the accident, even though the tender was overloaded, according to plaintiff's claim; for there was no vibration or movement of the tender at the time, or, apart from the movements of these servants, any agency that could or did dislodge and precipitate the coal from the tender to the ground; and if it be insisted as an explanation of the accident that the tender was so overloaded that the coal would fall upon plaintiff without any independent influence operating upon it, the danger would be so open and apparent that in performing his duties under the circumstances as disclosed in this case plaintiff would have clearly assumed the risk of injury, and could not recover therefor. But, if we go further, and connect the movements of the employee Dunn, who was on the engine, with the displacement of the piece of coal which fell upon plaintiff,—and from the evidence and statements of plaintiff himself it is clear that such must have been, to some extent, the efficient and immediate cause of the injury,—we are not able to sustain the verdict upon the ground that the engine tender had been negligently overloaded. It had in fact been loaded, and had run a considerable distance on the road before the accident, and at the time when plaintiff was hurt was standing perfectly still on defendant's track, openly visible to the most casual observer; and the lump of coal had not then fallen, and it seems certain, beyond any doubt, would not have fallen if it had not been directly

Injury to Em-  
ployee—Coal  
Falling from Car  
—Proximate  
Cause.

Weisel v. Eastern Ry. Co. of Minnesota

effected by the movements of Dunn, either alone or in connection with the acts of plaintiff or of his fellow servant, who was assisting him on the ground. In either case the defendant ought not to be required to anticipate that so unusual and peculiar a combination of circumstances would occur as to occasion so extraordinary and unexpected an accident from such a commonplace and ordinarily simple cause; or, in other words, we cannot hold that the overloading of the tender, if it was supplied with an unusual quantity of coal, was the proximate cause of plaintiff's injury, but that, notwithstanding the fact that the coal was piled loosely upon the tender, as is usual, the results that happened were brought about by a new and independent cause,—the acts of plaintiff's fellow servants,—for which defendant would not be responsible unless held for this negligence under the provisions of the co-employer's act itself, and not upon the common-law rule applicable in such a case.

We are also clearly of the opinion that under the fellow-servant act of this state, above referred to, as interpreted by the previous decisions of this court, plaintiff could not recover for the negligent acts of the fellow servants who were with him at the time of his injury. It is true, the coal was in the tender of the locomotive, which was, in its usual use, propelled by steam power on the defendant's railroad; but it was at the time of the accident standing perfectly still, and the danger of its contents being dislodged and falling was no other, different, or greater in any respect than from a stationary coal bin not connected with the railroad. In this respect, and by this test, as repeatedly made by this court, the risk to which plaintiff was subjected was not a railroad hazard, and within the protection of the statute. *Lavallee v. Railway Co.*, 40 Minn. 249, 38 Am. & Eng. R. Cas. 115, 41 N. W. 974; *Johnson v. Railway Co.*, 43 Minn. 222, 41 Am. & Eng. R. Cas. 293, 45 N. W. 156, 8 L. R. A. 419; *Pearson v. Railway Co.*, 47 Minn. 9, 48 Am. & Eng. R. Cas. 364, 49 N. W. 302. Order reversed, and a new trial awarded.

Same—Railroad  
Hazards—Fellow-  
Servant Act.

Konold v. Rio Grande W. Ry. Co

## KONOLD

v.

RIO GRANDE W. RY. CO.

*(Supreme Court of Utah, April 21, 1900.)*

**Injury to Employee—Defective Boiler—Contributory Negligence—**Evidence.—In an action for damages for personal injuries caused by the explosion of the boiler of a locomotive in charge of plaintiff, alleged to have been due to defects of which defendant was and plaintiff was not aware, the question of contributory negligence depending somewhat upon the time taken to run from one station to another, between which stations the explosion occurred, old time-tables of the defendant company, not in effect at the date of the accident, are inadmissible for the purpose of showing that no unusual danger was incurred by violating the requirements of the existing time-card, unless it be first shown that the conditions were the same at the date of the time-tables and the time of the accident.

**Same—Violation of Rules.**—When rules and regulations established by the master are habitually disobeyed, with the knowledge or express consent of the master, or have been disregarded without his express consent in such a manner and for such a length of time as to raise a presumption that the master (whose duty it is, not only to make and promulgate, whenever engaged in a business of such a nature as to require it, suitable rules and regulations for the protection of his servants, but also to use due care and diligence to have them enforced) must have become aware of such habitual disregard, and approved the same, such rules and regulations will be disregarded.

**Same—Same—Abrogation.\***—Evidence which shows a violation of rules and regulations as to running time between stations on only two occasions, one of them being the occasion of the accident, is not sufficient to show an abrogation of such rules and regulations.

**Same—Same—Same—Instructions.**—An instruction as to what would amount to abrogation of a published rule, predicated upon evidence which is insufficient to show abrogation, is objectionable, and objection thereto should have been sustained,

**Evidence of Other Acts of Negligence.**—Even when the negligence

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\*See *Louisville & N. R. Co. v. Bowcock*, ante, 420, and notes, 427.

Konold v. Rio Grande W. Ry. Co

of an agent on a particular occasion is an issue in the case, evidence that he was negligent on other occasions is not admissible.

**Instructions.**—It is not error to refuse an instruction, when the instruction asked is fully covered by other instructions given.

**Master and Servant—Assumption of Risk—Machinery—Care Required of Master.\***—The rule as to the assumption of hazard is that a master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by him; and an instruction that "the plaintiff did not undertake to incur risks arising from defective machinery or other instruments with which he is to work. His contract implied that in regard to these matters the defendant would make adequate provision that no unnecessary danger should ensue to him,"—incorrectly states the rule, and is erroneous.

**Instructions.**—The giving of contradictory and inconsistent instructions is error.

**Evidence—Experiments.**—Experiments are not competent as evidence unless the conditions under which they are made are the same, or approximately the same, as those which attended the event in regard to which the experiments are made; and, the admissibility of such evidence being discretionary with the trial judge, his decision will not be reviewed, except in case of a palpable abuse of such discretion.

(Syllabus by the Court.)

**APPEAL** by defendant from Seventh district district court.  
*Reversed.*

*Bennett, Harkness, Howat, Sutherland & Van Cott*, for appellant.

*C. C. Richards, E. M. Allison, and H. R. Macmillan, Jr.*, for respondent.

**BASKIN, J.** This is an action for the recovery of damages on account of injuries sustained by plaintiff on the 27th day of May, 1896, while in the employ of defendant as an engineer on its railroad, alleged to have been caused by the explosion of a defective boiler, which the plaintiff, in the discharge of his duties as engineer of the

Case Stated.

\*As to employee's assumption of risks, see generally 11 Am. & Eng. R. Cas., N. S., 484 *et seq.*, notes.

As to degree of care required of master in furnishing machinery, etc., see 12 Am. & Eng. R. Cas., N. S., 668 *et seq.*, notes.

## Konold v. Rio Grande W. Ry. Co

defendant, was engaged in using, and of which defects the defendant was, but the plaintiff was not, aware. The answer denied these allegations, and alleged contributory negligence on the part of plaintiff. Upon the trial the jury returned a verdict in favor of the plaintiff for \$8,000, and judgment for that sum was rendered against defendant. From this judgment the defendant has appealed.

1. The plaintiff, as engineer, was in charge of the locomotive on which the explosion which caused the injury occurred, and in running the train it was his duty to observe the reasonable and proper rules and regulations of his employer. If he failed to do so, and such failure directly contributed to his injury, he cannot recover, in the absence of some legitimate excuse for his disobedience of such rules and regulations. *Thomp. Neg.* p. 1018, § 23; *Bailey, Mast. Liab.* pp. 88, 89; *Wolsey v. Railroad Co.*, 33 Ohio St. 227; *Crew v. Railway Co.*, 20 Fed. 87; *Lyon v. Railroad Co.*, 31 Mich. 429; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Railroad Co. v. Thomas*, 51 Miss. 637. It appears from the evidence that the train, the number of which was 20, consisted of 32 freight cars, weighing 830 tons; that it reached Lower Crossing more than an hour behind time; that the distance from Lower Crossing to Cliff Siding, between which places the explosion occurred, is 5.7 miles, and the railroad track between these places is a single one. The plaintiff testified: "It is a little downgrade, if anything, going east out of Lower Crossing. Then there is a light grade, running from 7-10 to 9-10 of 1 per cent. That grade continues to within 800 feet of where the explosion occurred, and from there to where the explosion occurred it is level. We had got over the hill, and onto the level, about 800 or 900 feet, before the explosion occurred. Just about the length of my train." He also testified that, "when we left Lower Crossing, we had to make a meeting point with a passenger train at Cliff Siding." The passenger train was on time and was due at that point at 4:54 p. m. The plaintiff also testified that the

Injury to  
Employee—  
Defective Boiler  
—Contributory  
Negligence—  
Evidence.

Konold v. Rio Grande W. Ry. Co

train left Lower Crossing at 4:30 p. m. William Allen, the agent and telegraph operator of the railroad at Lower Crossing, testified, without objection by respondent, that he was on duty there on the day of the explosion; that it was his duty to enter the arrival and departure of each train on a sheet provided for that purpose by the company; that on that day the train on which the plaintiff was injured left Lower Crossing, going towards Cliff Siding, at 4:33 $\frac{3}{4}$  p. m., and that he entered the time of departure at 4:33 p. m., because fractions of minutes, under the instructions of the company, were not to be entered. Counsel for the appellant state in their brief, and it is not disputed by counsel for respondent, that the sheet in which this entry was made was used in the former trial of this case, and was lost at that trial. The plaintiff, on cross-examination, stated, in substance, that he knew it was the duty of the station agent at said crossing to take down the time the train left, and wire it to the dispatcher in Salt Lake City; that he believed such to be the rule of the company, and they have a clock there for that purpose; that he saw at the former trial the record made by Allen, saying that the train left at 4:33 p. m., and heard him testify that he made it correctly, except that he gave us the benefit of  $\frac{3}{4}$  of a minute, but that the record was not correct. He also stated that he had a time-card for his guidance in running the train. This card was introduced in evidence by the defendant, and in terms allowed 30 minutes in which to run that train from Lower Crossing to Cliff Siding. The plaintiff, on cross-examination, further stated that he had at the time, also, a book containing the regulations of the company for his guidance as an engineer. The defendant introduced, and read in evidence from said book, the following: "Notice. A perfect familiarity with and a strict observance of these rules will be expected of and required from all employees." Train rules: "Rule 86. When a train of inferior class meets a train of superior class on single track, the train of inferior class must take the side, and clear the train of superior class

*Konold v. Rio Grande W. Ry. Co*

five minutes. The train of inferior class must keep five minutes off the time of the train of superior class following it." Respondent's counsel state in their brief that this rule required freight trains, when meeting passenger trains, to get onto the side track 5 minutes before the passenger trains were due. We think that such is the requirement of that rule, so that if, as stated by plaintiff, the train left Lower Crossing at 4:30 p. m., it would have to make the run to Cliff Siding in 19 minutes in order to properly clear the way for the approaching passenger train, and if, as stated by Allen, it left at 4:33 p. m., it would have to make the run in 16 minutes. Plaintiff made no objection to the admission in evidence of the time-card and the portions of said book read to the jury, but in rebuttal thereof, and for the purpose of showing that no unusual danger was incurred by violating the requirements of the time-card and the rules and regulations of the company, offered in evidence four of the company's time-tables, the first of which went into effect March 31, 1895, the second January 17, 1897, the third November 3, 1897, and the fourth March 5, 1898. The running time for freight trains from Lower Crossing to Cliff Siding fixed by these time-tables was, respectively, 22, 25, 23, and 18 minutes. These time-tables were not in effect at the time the plaintiff was injured, and did not impose upon him any duties. His duties in respect to the running of the train were those prescribed in the aforesaid time-card and book of rules and regulations of the company. The defendant objected to the introduction of each of these four time-tables, as they were severally introduced, on the ground that they were immaterial, not being in effect at the time of the accident, and it not having been shown that the conditions which attended the trains to which said time-tables related were the same as the conditions which attended the train on which the plaintiff was injured, in this: It was not shown that the engines were the same, or that the trains were the same, or were of the same class. The objection was overruled, and the proffered evidence admitted. There can be no

Konold v. Rio Grande W. Ry. Co

doubt but that, unless the conditions were the same, and the plaintiff first laid the foundation for the admission of said time-tables by proof of that fact, the trial court erred in overruling the objection. Respondent's counsel state in their brief that "the same conditions were not shown to exist when the time-tables were received in evidence," but claim that later on in the trial the objections thereto were obviated by the testimony of Mr. Allen, a witness for the defendant. On cross-examination Mr. Allen stated that he did not know whether the engines were the same, and no other witness stated that they were the same. Nor was it shown, or any attempt to show made, that any of the trains subject to said time-tables, which were hauled, were composed approximately of the same number of cars, or were approximately of the same weight, as the train on which the explosion occurred. The engines used in moving said trains may have had sufficient capacity to haul a train of much greater capacity and weight than the one on which the explosion occurred from Lower Crossing to Cliff Siding in a shorter time than even 18 minutes; and no engine of the same or approximate capacity may ever have drawn any train which was subject to said time-tables, of the same or approximate size and weight as the one in charge of plaintiff, from Lower Crossing to Cliff Siding in the time attempted by plaintiff, and nothing to the contrary appears from the showing made. Mr. Allen, on cross-examination, further stated that two of said trains were of the same class as the one in charge of plaintiff, but that fact does obviate the objection.

2. Respondent's counsel, in their brief, state that "it is not denied that it was the duty of conductors and engineers in running their trains to obey the rules and regulations promulgated by their superiors for their guidance, provided that such rules and regulations are <sup>Same—Violation of Rules.</sup> reasonable and are enforced," but claim that the printed rules and time-cards of the company were not enforced, but were habitually violated, and that



## Konold v. Rio Grande W. Ry. Co

therefore the plaintiff was not bound to obey the same. The true rule on this subject is that when the rules and regulations established by the master are habitually disobeyed with the knowledge or express consent of the master, or have been disregarded without his express consent in such a manner and for such a length of time as to raise a presumption that the master—whose duty it is, not only to make and promulgate, whenever engaged in a business of such a nature as to require it, suitable rules and regulations for the protection of his servants, but also to use due care and diligence to have them enforced (*Pool v. Southern Pac. Co.*, 21 Utah, —, 58 Pac. 328, 329)—must have become aware of such habitual disregard, and approved the same, such rules and regulations will be regarded as abrogated. This view is sustained by the opinion of MR. JUSTICE BARTCH, and the cases cited therein, in the case of *Wright v. Same*, 14 Utah 394, 395, 46 Pac. 374. There is no evidence tending to show that the company expressly authorized any infractions of its rules or regulations, or that its officers had actual knowledge of any violation of the same, except in the one instance hereinafter mentioned. Therefore, if the rules and regulations of the company were ever abrogated, it must have been done by the habitual disregard of the same in such a manner and for such a length of time as to raise the presumption before mentioned. It appears from the evidence upon this point that, previous to the explosion, the plaintiff had made three round trips, in which, going and returning, he passed Lower Crossing and Cliff Siding six times; that he started on the first trip on the 1st day of May, 1896, and returned on the 3d day of that month. When the other trips were made does not appear. The explosion occurred on the 27th of that month. In the examination in chief of plaintiff, he was asked the following questions, and answered as follows: "Q. How often had you gone over that road? JUDGE HOWAT says once. A. I had made three round trips prior to that time. Q. Six times you went past there, isn't it? A. Yes, sir; on that particular division. Q. Do you

Konold v. Rio Grande W. Ry. Co

know the custom that existed,—do you know the practice that obtained on defendant's road at this point,—when a superior train was to meet an inferior train, as to how soon the inferior train should get to the meeting point before the arrival of the superior train?

A. Yes, sir. Q. Now state, if you please, what that custom is,—the practice. A. The practice was that if we got there

in the clear sufficient time to get out of the way of the passenger, or, in case of not being there in time, to put in protected, was all that was required of us by the practice. Q. What was 'protected'?

A. To send out a flagman a distance that they can plainly see us, and stop their train, in case we didn't get on the switch, or anything happened we could not get in."

On cross-examination he stated that in making these three round trips he did not meet any passenger trains at Cliff Siding going from Lower Crossing; that he understood it to be the practice, in meeting passenger trains at Cliff Siding, to disregard said instructions; that he did not have any instructions on that day (the day of the injury), with regard to the running at that particular point, except the time-card.

Mr. Allen further testified: "It was the practice for the trainmen not to undertake to get their trains up from Lower Crossing to Cliff Siding, and sidetrack them, in less than 35 minutes, as against the passenger train. There are second-class trains, which are only allowed to carry 550 tons, which would take less time to go." He only knew of one violation of this practice, and in that connection he made the following statement: "There are some things which impress on my mind this one time when the train came in in less time against the passenger train, and that is that General Superintendent Welby was on the passenger train that day, and the conductor came in on front of the engine, on the pilot, just about the time—just a little before—the passenger train was due, only a minute or so, and the conductor was not on the road but a very short time after that." The train on which the plaintiff was injured, at the time of the injury, was running against a

## Konold v. Rio Grande W. Ry. Co

passenger train. There was no evidence whatever adduced in the case, showing or tending to show that a train of any class ever made or attempted to run from Lower Crossing to Cliff Siding against a passenger train in less time than was provided by the rules or regulations of the company, but twice,—once on the occasion mentioned by the witness Allen, and on the occasion when the plaintiff was injured. The evidence was not sufficient to show that the rules and regulations of the company, so far as they related to the train on which the plaintiff was injured, had been abrogated, or to raise in regard to the same the presumption before mentioned. Therefore the admission of the testimony objected to by the defendant was error.

3. The following instruction, predicated upon the evidence relating to the abrogation of the rules and regulations of the company, was given: "If the defendant company suffered for a length of time amounting to approval, or actually approved, the habitual disregard of any of its rule and regulations in evidence, then in that case such rules so habitually disregarded, if it were disregarded, was inoperative and abrogated, and the practice followed became the rule." An exception to this instruction was duly taken by the defendant, based upon the objection that there was no evidence on which to predicate it. It follows from our conclusion on this question hereinbefore announced that the objection should have been sustained.

For the purpose of breaking the force of the entry of the time at which the wrecked train left Lower Crossing, and which entry was conceded to have been made by Allen, as agent, on the sheet furnished to him by the company for that purpose, and which the plaintiff in his testimony stated it was the duty of Allen, as agent, to make, and that he had made an entry of the time, but not correctly, plaintiff's attorney asked him the following questions: "Q. What is the practice pursued by railroad agents in making records, as to having it exact or

Same—Same—  
Abrogation.Same—Same—  
Same—Instruc-  
tions.Evidence of Other  
Acts of Negli-  
gence.

*Konold v. Rio Grande W. Ry. Co*

otherwise?" "Q. What was the practice as to making the departure and arrival of trains correctly?" Defendant's attorney made the following objection to these questions: "I object to that as being immaterial and incompetent, for the reason that it does not refer to this particular entry made by the station agent at Lower Crossing. If that was correct, it was immaterial whether other people indulged in the practice of being incorrect or not." This objection was overruled, and the plaintiff made the following answers: "A. They are not always made correctly." "A. Very often they would ask some engineer, or some one else sitting around the office, as to what time the train did depart, and record it that way." The questions were not confined to the practice of Allen, nor do the answers assert that it was his practice to make false entries. The fact that it was the practice of other agents to disregard their duties did not tend to show that such was the practice of Allen, or that the entry in question was false. Even when the negligence of an agent on a particular occasion is an issue in the case, evidence that he was negligent on other occasions is not admissible, and has no legitimate bearing upon the question. *Maguire v. Railroad Co.*, 115 Mass. 239; *Railroad Co. v. Hodge*, 55 Ill. App. 166. The objection of defendant should have been sustained.

5. The defendant asked the trial court to give the following instruction: "When the plaintiff entered the service of the defendant company as a locomotive engineer, he assumed all the risks of the occupation that were ordinarily incident to it, and all risks arising from the defective condition of the machinery and appliances that were not observable by the defendant in the exercise of ordinary care; and for an injury to himself arising from any of these assumed risks the plaintiff cannot recover." This instruction the court refused to give as requested, but modified the same by adding thereto the following: "The plaintiff did not undertake to incur risks arising from defective machinery or other instruments with which he is to work. His contract implied that in regard to these matters the defendant

## Konold v. Rio Grande W. Ry. Co

would make adequate provision that no unnecessary danger should ensue to him,"—and gave the instruction as modified. The defendant excepted to the refusal to give the instruction requested, and also to the giving of the instruction as modified. This modification is not consistent with that portion of the modified instruction which the defendant requested to be given, and is contradictory to and inconsistent with other instructions given by the court. The thirteenth instruction given by the court is as follows: "The defendant was not required to warrant the perfection of its machinery or appliances, or to insure its employees from injury from boiler explosions or other like accidents. The defendant's duty to the employees was only to use due care and diligence, first, to furnish a suitable and safe engine, and the due care and diligence to keep it in that condition. And by 'due care and diligence' I mean the care and diligence which a man of ordinary prudence, engaged in like business, would exercise for his own protection and the protection of his property." Other instructions of like character were also given. These instructions correctly stated the law applicable to this branch of the case, and therefore no error was committed in refusing to give the instruction

**Instructions.**

asked for by defendant, because the instructions given fully covered the same ground. The objectionable part of the modified instruction is the modification. The modification is based upon the language used by JUDGE FIELD in the case of *Railroad Co. v. Herbert*, 116 U. S. 648, 6 Sup. Ct. 593, 27 L. Ed. 758, which is as follows: "The servant does not undertake to incur the risk, arising from the want of sufficient and skillful co-laborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him." In connection with this language JUDGE FIELD cites the case of *Hough v. Railway Co.*, 100 U. S. 217, 25 L. Ed. 615, and quoted language therefrom which modifies the language used by him. In the opinion in that

Konold v. Rio Grande W. Ry. Co

case it is said: "One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter." In the case of Railroad Co. v. McDade, 135 U. S. 569, 10 Sup. Ct. 1049, 34 L. Ed. 240, the instruction to the jury was as follows: "The jury are instructed that the defendant was not a guarantor of the safety of its machinery, and was only bound to use ordinary care and prudence in the selection and arrangement and care thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe." In passing upon the validity of this and other like instructions the court said: "We do not think there was any error in any of these instructions of which the defendant had any right to complain. The propositions contained in them are in strict accord with the principles laid down by the decisions of this court,"—and cited in support thereof the following cases: Hough v. Railway Co., 100 U. S. 213, 217, 25 L. Ed. 612; Railroad Co. v. Herbert, 116 U. S. 642, 647, 6 Sup. Ct. 590, 29 L. Ed. 755; Kane v. Railway Co., 128 U. S. 91, 94, 9 Sup. Ct. 16, 32 L. Ed. 339; Jones v. Railroad Co., 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478. A note at the end of the opinion indicates that JUDGE FIELD sat in the case. From the foregoing facts it is clear that the case of Railroad Co. v. Herbert, *supra*, does not warrant said modification, but that it is against the rule settled by the United States supreme court. The cases of other courts holding the same doctrine are numerous. In fact, there is no conflict in regard to the rule.

Master and Servant—Assumption of Risk—Machinery—Care Required of Master.

Konold v. Rio Grande W. Ry. Co

6. Respondent contends that all of the instructions should be construed together, and that the thirteenth instruction, before quoted, and those of the same character given, "fully protected the appellant on this point" (the one raised by appellant on the modified instruction).

Instructions.

Instructions on a material point in the case which are inconsistent or contradictory should not be given. The giving of such instructions is error, and a sufficient ground of reversal, because it is impossible, after verdict, to ascertain which instruction the jury followed, or what influence the erroneous instruction had in their deliberation. This has been so uniformly held that citations are unnecessary.

7. The appellant claimed at the trial that the contributory negligence of the plaintiff consisted of allowing the water in the boiler to become so low as to leave a portion of the crown sheet bare and become heated to a red heat, and thus cause the explosion. To establish this the defendant offered to prove certain experiments by H. V. Wille, a mechanical engineer and expert, which he had made for the express purpose of determining the cause of the explosion. Objection having been made by plaintiff on the ground that the conditions, as stated by Wille, under which he made the experiments, were not the same, or so similar, as those attending the explosion, "that the court and jury could say that the result would be the same," the court refused to permit the experiments to be submitted to the jury. There is nothing in the abstract which shows that Wille, as an expert, expressed any opinion as to the cause of the explosion. Therefore the cases cited by appellant's counsel are inapplicable which hold "that one who has given his opinion in evidence as an expert may also be permitted to testify to the grounds of the opinion expressed, which frequently includes evidence of experiments made during the course of his investigation of the subject to which his testimony relates." 12 Am. & Eng. Enc. Law (2d Ed.) 109, and cases there cited, among which is the case of *People v. Thompson* (Mich.), 81 N. W.

Evidence—Ex-  
periments.

## Fluhter v. Lake Shore &amp; M. S. Ry. Co

344, and upon which counsel for appellant laid much stress. The general rule on the subject is that experiments are not competent as evidence, unless the conditions under which they are made are the same, or approximately the same, as those which attended the event in regard to which the experiments are made. In passing upon the admissability of such evidence, the presiding judge exercises a discretionary power, and his decision, except in a case of palpable abuse of the discretion, will not be reviewed by an appellate court. 12 Am. & Eng. Enc. Law (2d Ed.) 400, and cases cited; *State v. Webb*, 18 Utah 441, 56 Pac. 159. The foundation laid for the admission of said experiments was in some particulars unsatisfactory, and therefore we do not think that such an abuse of discretion appears as would justify a reversal of the judgment.

It is not necessary to pass upon the other questions raised in the case. It is ordered that the judgment be reversed, at the costs of respondent, and that the case be remanded, with directions to the court below to grant a new trial.

BARTCH, C. J., and MINER, J., concur.

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FLURRRR

v.

## LAKE SHORE &amp; M. S. RY. CO.

(*Supreme Court of Michigan, Sept. 19, 1899.*)

**Injury to Employee—Cause of Accident—Question for Jury.**—In an action for the death of a brakeman alleged to have been caused by the defective condition of the planking between the rails at defendant's yard, at a highway crossing, where deceased was uncoupling cars, whether he caught his foot in a crack in such planking was a question for the jury.

**Same—Defective Crossing—Notice—Assumption of Risk.**—It cannot be said as a matter of law, that a brakeman must know the condition of the planking at every crossing along the line of the road,



## Fluhrer v. Lake Shore &amp; M. S. Ry. Co

and therefore, in switching cars at such a point, he assumes the risks incident to its defective condition.

**Same—Violation of Rule as Contributory Negligence—Customs.**—Where the cause of the death of a brakeman is his violation of a rule, of which he had notice, forbidding him to enter between cars in motion to uncouple them, such rule is a defense to an action for the death, unless plaintiff proves that the defendant railroad had sanctioned a departure from the rule by a custom so universal and notorious that it must be presumed that defendant had notice of the custom and to have ratified it.

**Excessive Verdict.**—The verdict was excessive.

**Negligence of Fellow Servant Concurring with Negligence of Master.\***—In such action, it appearing that defendant had prior to the accident, sufficient notice of the defective condition of the planking to charge it with negligence in not repairing it, it was immaterial whether the failure to repair was the negligence of a fellow servant.

**ERROR** by defendant to Lenawee county circuit court.  
*Reversed.*

John M. Fluhrer, deceased, was a brakeman on the defendant's road between Adrian and Jackson. He was killed while switching at defendant's yard at Tecumseh, July 14, 1893, at a highway crossing. The

*Case Stated.*

defendant had three tracks at this crossing. The highway was planked between the tracks in the usual manner. Mr. Fluhrer was head brakeman. The engine had two cars attached, and had passed from one track onto the other. It was his duty to turn the switch, and then give notice to the engineer to back up. This he did. As the engine commenced to back he went forward to meet it, stepped between two box cars upon the crossing to uncouple them, and in doing so was killed. The negligence charged is the failure to keep this planking in proper condition. It is claimed that the plank next to the rail had become worn away or split off so as to leave a space from 3 to 3½ inches wide between the rail and the plank, so that, when Mr. Fluhrer stepped in, his foot got caught in this space,

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\*See note, 12 Am. & Eng. R. Cas., N. S., 719.

Fluhrer v. Lake Shore & M. S. Ry. Co

and caused the accident. Plaintiff recovered a verdict and judgment for \$6,900.

*C. E. Weaver* (*Geo. C. Greene* and *O. G. Getzen-Danner*, of counsel), for appellant.

*Watts, Bean & Smith*, for appellee.

GRANT, C. J. (after stating the facts). Defendant requested the court to direct a verdict for it, and this request presents the first assignment of error.

1. It is urged that there is no proof that the decedent's foot was caught in the crack. The shoe was produced in evidence, made an exhibit, and returned to this court. It shows that in some manner it was run over by the wheel. Plaintiff gave testimony, from persons who were a short distance away, and reached the place of the accident within a few moments, that the shoe was found in the crack. The defendant gave evidence, from the engineer, conductor, and others, that they were first upon the scene, and that the shoe was outside the track. It has no marks of blood upon it. The foot and ankle were crushed. If, therefore, the foot was in the shoe at the time the latter was run over, it would have been covered with blood, but was not. The only other inference would be that the deceased pulled his foot from the shoe before the wheel struck it. We think this question was properly left to the jury.

*Injury to Employee—Cause of Accident—Question for Jury.*

2. It is urged that deceased assumed the risk, and that, if the defect was such as is claimed, it must or should have been known to him. For some time he had been a brakeman over this branch, and had done switching at this crossing and about 40 others. This is not like the *Gleason v. Railroad Co.* (Mass.), 34 N. E. 79, where the deceased had been working in the same yard for six weeks, during which time the planking had remained in the same condition. Nor is it like the case of *Ragon v. Railway Co.*, 97 Mich. 265, 56 N. W. 612, where

*Same—Defective Crossing—Notice—Assumption of Risk.*

Fluhrer v. Lake Shore &amp; M. S. Ry. Co

the side track had not been ballasted, while plaintiff posed it was smooth, but he had passed the place frequently in the discharge of his duties. These cases are so different from this that we refrain from discussing the point further. It cannot be said, as a matter of law, that a brakeman should know the condition of the planking at every crossing along the line of the road.

3. The most difficult question is whether negligence is chargeable to the deceased in going between the moving cars to uncouple them. The deceased was an experienced brakeman, and had been in the employ of the company as brakeman for seven months; was furnished with a copy of its rules December 28, 1892, and signed a contract in which he acknowledged to have received and read them, and especially

“the caution and rules numbers 601, 602, and 603, as shown on back hereof.” That portion of rule 602 applicable to jumping on and off trains or engines when in motion, going between cars in motion to uncouple them, and all similar acts, are dangerous. All employees are warned that, if they commit them, it will be at their peril and risk.” In this contract he agreed as follows: “I will, so long as I remain in its service, faithfully read and obey all said orders, rules, and regulations, and all others which may be adopted, and of which I may be given notice; and I do further agree that I will, for myself, in all cases, before exposing myself in working, or in being on the track or grounds of the company, or in working with machinery, or tools, examine, for my own safety, the condition of all machinery, tools, tracks, cars, engines, or wheels, ever I may undertake to work upon or with, before I make use of or expose myself on or with the same, so as to ascertain so far as I reasonably can, their condition and soundness, and that I will promptly report, either to the superintendent of the company, or to its agent who may be my immediate superior officer, any defect in any track, machinery, tool

Same—Violation  
of Rule as Con-  
tributory Negli-  
gence—Customs.

## Fluhrer v. Lake Shore &amp; M. S. Ry. Co

property of the company affecting the safety of any one using or operating upon or with the same. The object of this agreement being—First, to protect me from suffering personal injury from any cause ; second, that while the company will be responsible to me for the discharge of all its duties and obligations to me, and for any fault or neglect of its own, or of its board of directors or general officers, which are the proximate cause of injury, yet it will not be responsible to me for the consequences of my own fault or neglect, or that of any other employees of the company, whether they, or either of them, are superior to me in authority or not. It being expressly agreed on the part of the company that it is my right and duty, under all circumstances, to take sufficient time, before exposing myself, to make such examination as I have here agreed to, and to refuse to obey any order that would expose me to danger." Defendant preferred the instruction, which was refused, that decedent's attempt to uncouple the cars while in motion barred recovery, and the alternative instruction that it was the duty of the decedent to obey this rule, and if he did not, but went between the moving cars and attempted to uncouple them while in motion, and thereby received the injuries which caused his death, then this conduct was in violation of the rule, and plaintiff could not recover. It is well settled that a violation of the rules of the company will defeat recovery. The exception to this is where the company itself has sanctioned the custom of their employees to act in violation of the rules, and has thus virtually abrogated them. This exception is based upon the theory that it would be unjust in employers to establish rules, and then sanction their violation, and interpose such violation as a defense. *Hunn v. Railroad Co.*, 78 Mich. 513, 526, 41 Am. & Eng. R. Cas. 452, 44 N. W. 502; *Eastman v. Railway Co.*, 101 Mich. 597, 602, 60 N. W. 309. Fairly construed, the above rule is notice to brakemen not to enter between the cars while in motion, to uncouple them, and an agreement not to do so. The danger in doing so is apparent. Only when this rule is violated by brakemen so universally

## Fluhrer v. Lake Shore &amp; M. S. Ry. Co

and notoriously that it is a fair inference that the company sanctioned and approved the violation is the company barred from this defense. The court instructed the jury that if they believed that the motion of the cars was so slow that it was not negligence to pass between them to uncouple them, and that such was the usual custom of brakemen under like circumstances, then such act would not necessarily prevent recovery by the plaintiff. There was evidence tending to show that it was usual and customary for brakemen to pass between the cars while in motion, to uncouple them. The case was not submitted to the jury upon the theory that the company had sanctioned a violation of this rule. The question was not referred to in the instructions. Under the instructions given, this rule was virtually thrown out of consideration, and the jury permitted to find that, if it was customary for brakemen to do this, then it was not negligence on the part of the plaintiff. Custom alone is not sufficient. It was held in *Glover v. Scotten*, 82 Mich. 369, 46 N. W. 936, that where a safe place was provided for switchmen to ride, and they chose to ride in a more dangerous one, and always did so, that would not relieve them from contributory negligence. When the defendant had entered into the contract with the deceased, in which he acknowledged the receipt of a copy of these rules, and agreed to abide by them, it had met the plaintiff's case, even though it was not negligence *per se* to go between the cars when in motion. The *onus probandi* was then cast upon the plaintiff to show that the company sanctioned a departure from the rule by a custom so universal and notorious that the company was presumed to have had knowledge of it and to have ratified it. This is an important feature of the case, and was not, we think, by the instructions, properly submitted to the jury. Counsel for plaintiff urge that the evidence does not show that Fluhrer ever read or saw these rules. The production of the duplicate contract signed by him was *prima facie* proof that he had received and read them. If there was a conflict of testimony on this point, it should be submitted to the jury under proper instructions.

Fluhrer v. Lake Shore &amp; M. S. Ry. Co

4. We think the verdict excessive. It is evident that the jury based it upon the claimed testimony that the deceased had contributed to his wife \$30 per month for her support and maintenance, and would have continued to do so during the entire expectancy of his life according to the tables. The testimony does not show that he contributed to her \$30 out of his earnings of \$45 per month. This \$30, as testified by the plaintiff, included rent and household expenses both for herself and husband. It would be absurd to hold that a husband gave his wife \$30, and that he lived upon \$15. It is further apparent that the jury estimated the damages upon the compound discount table which was introduced in evidence, subject to objection, at 6 per cent. per annum. \$6,900 at 6 per cent. would yield \$414. This would give plaintiff more money annually than she could by any possibility have received from her husband. If it be said that money cannot now be loaned at 6 per cent., it should be replied that annuities should not, therefore, be computed at 6 per cent. This court, in an opinion written by JUSTICE CAMPBELL in *Staal v. Railroad Co.*, 57 Mich. 239, 23 N. W. 795, said, "\$5,000 seems to be a large verdict, but, when we consider how it is apportioned, it loses some of its apparent magnitude." There were in that case three minor children. Of the amount recovered \$1,666.66 went to a widow, and \$1,111.11 to each of the children. It was also said in that case, "Courts should not allow juries to give anything that goes beyond a fair pecuniary compensation, based on the actual pecuniary loss." See, also, *Nelson v. Railway Co.*, 104 Mich. 582, 62 N. W. 993.

5. Error is assigned upon the refusal to instruct the jury that the section foreman was furnished with the necessary material to renew the planking on this and other crossings whenever the same was necessary; that, therefore, the railway company had fulfilled its duty in that regard; and that, if said foreman neglected to repair the planking when needed, such negligent act was the act of a fellow

Excessive Verdict.

Negligence of Fellow Servant Concurring with Negligence of Master.

Missouri, K. & T. Ry. Co. v. Merrill

servant. The only testimony upon this point was from the road master, who testified that he kept the section foreman at Tecumseh supplied with raw material for the renewal of the planking from time to time, and that his instructions were to watch those things and repair them as needed. Counsel relies upon *Gardner v. Railroad Co.*, 58 Mich. 584, 24 Am. & Eng. R. Cas. 435, 26 N. W. 301, to support this contention. The differences between the facts in that case and this are apparent, and I will not take time to point them out. The request leaves out one important element, viz. the existence of this defect for so long a time that the defendant may be presumed to have notice of it. *Retan v. Railway Co.*, 94 Mich. 146, 55 Am. & Eng. R. Cas. 97, 53 N. W. 1094. Judgment reversed, and new trial ordered.

LONG, J. concurred.

HOOKEE, J. I concur in the above, except on the question of damages.

MONTGOMERY and MOORE, JJ., concurred with HOOKEE, J.

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MISSOURI, K. & T. RY. CO. *et al.*

*v.*

MERRILL.

KANSAS CITY SUBURBAN BELT R. CO.

*v.*

MERRILL *et al.*

(*Supreme Court of Kansas, April 7, 1900.*)

Injury to Employee—Negligence in Loading Cars—Failure to Inspect—Concurrent Negligence—Liability of Connecting Carriers.\*—A railway company loaded a coal car with iron pipe for shipment to a town beyond the terminus of its line. One of the end gates of the car was not provided with hooks or eye bolts to hold it in an upright

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\*See notes at end of case.

## Missouri, K. &amp; T. Ry. Co. v. Merrill

position. Wooden cleats were nailed to the side boards of the car to fasten the end gate in place. At the end of its road the car was inspected by the first company, and turned over to another railroad company, which again inspected it and delivered it to a third railway company having a line running to the place of destination. A switchman employed by the latter, while engaged in making up a freight train, in going back over the cars while they were in motion, stepped on this end gate, and attempted to reach to a ladder of a box car next to it in the train about four feet distant. The pressure of the iron pipe had pushed the side boards to which the cleats were nailed away from the end gate, so that the latter toppled over, causing plaintiff to fall between the cars to his injury. *Held*, that it was within the knowledge and contemplation of the first two companies that such cars were to be handled by switchmen of connecting lines, and that they owed a duty to the latter to the extent that the car transported should be in reasonable repair, so that in switching it no harm should result. *Held*, further, that the first two railway companies may be sued jointly, that the negligence of the company in possession of the car at the time of the accident in failing to inspect it was concurrent merely, and did not break the casual connection between the negligence of the first two companies and plaintiff's injury.

**Expert Testimony.\***—An experienced railroad man, familiar with coal cars and the work of making up freight trains, was asked his opinion regarding the proper position or proper steps for an employee of the railway company to take in order to pass from a box to a coal car when the same were in motion. A hypothetical question put to the witness described the situation of the plaintiff and his surroundings immediately prior to being hurt. *Held*, that the opinion sought was competent. It cannot be assumed that the jury was equally qualified with the witness to know the proper position for plaintiff to take at the time, and that the question called for information on a subject technical in character, requiring peculiar knowledge and training.

**Instructions.**—An instruction criticised which tended to leave an impression with the jury that unless defendants, by their evidence, established contributory negligence, the defense of such contributory negligence must fail.

(Syllabus by the Court.)

**ERROR** by defendants from Wyandotte county court of common pleas. *Reversed*.

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\*See notes at end of case,



Missouri, K. &amp; T. Ry. Co. v. Merrill

This was an action to recover damages for personal injuries, brought by L. T. Merrill. Briefly stated, the facts are as follows: At the time of the injury he was in the employ of the Chicago Great Western Railway Company in the capacity of a switchman. A coal car was loaded with iron pipe by the Missouri, Kansas & Texas Railway Company in St. Louis for shipment to St. Joseph, Mo. There were side boards and end gates upon the car a little more than three feet high. The side boards were stationary, but the end gates were fastened to the floor of the car with hinges so they would lie flat when the car was not loaded. There were no hooks or eyebolts on either end gate, and no means of fastening them in place. Cleats were nailed on the inside of the end gates fastened to the side boards of the car, against which the end gates rested when in an upright position. When the car was loaded, the iron pipes came up to a level with the top of the sides and end gates. Upon the arrival of this car in Kansas City it was inspected by an authorized inspector of the Missouri, Kansas & Texas Railway. It was then delivered to the Suburban Belt Railway, to be delivered to the Chicago Great Western Railway. The Suburban Belt Company inspected the car, and delivered it, with about 25 others, to the Chicago Great Western Company for transportation to St. Joseph, Mo. The latter company, in making up a train in its yards at Kansas City, Kan., was engaged in switching this with other cars. It, with several others, was attached to an engine backing in a southeasterly direction. While the cars were moving at a rate of speed between four and five miles an hour, plaintiff below started towards the south end of the moving cars for the purpose of getting off and throwing a switch. It was necessary for him to go over and across this coal car, which was between two box cars. The cars were on a curve in the yards. He walked on top of the iron pipes, and, standing upon the end gate, attempted to reach an iron ladder on the box car immediately south of and attached to the coal car. The ladder was on the side,

Missouri, K. & T. Ry. Co. v. Merrill

but near to the end of the box car. There was a distance of about four feet between the end gate of the coal car and the ladder of the box car. He stood upon the end gate, and, in his efforts to reach or jump so that he might catch hold of the ladder, the thrust given by his body against the end gate caused it to topple over several inches, by reason of which he was thrown under the train, run over, and injured. It appeared that the weight of the load had sprung the sides of the coal car outward, so that the cleats against the end gate did not perform the service intended in holding the same in a rigid position. The ends of the iron pipes did not rest against the end gate. There was a space of about 15 inches between the inside of the end gate and the ends of the pipes; and outside of the end gate the bottom of the car projected, leaving a platform of from 18 inches to 2 feet. The inspector of the Chicago Great Western Company examined the car, and placed a red card upon it, indicating that it needed repairs. There was no evidence, however, that Merrill saw this card. The acts of negligence charged against defendants below were a failure upon the part of the Missouri, Kansas & Texas and Suburban Belt Companies to place the car in a reasonably safe condition before delivering it to the connecting carrier; that the Missouri, Kansas & Texas Company carelessly loaded it with iron pipe while it was in a defective and dangerous condition, and delivered it to the Suburban Belt Company, and the latter carelessly delivered it to the Chicago Great Western while it was in the same dangerous and defective condition. There was a verdict and judgment for the plaintiff below against the Missouri, Kansas & Texas Railway Company and the Kansas City Suburban Belt Railroad Company jointly.

*T. N. Sedgwick, Silas Porter, Trimble & Braley, John A. Eaton, and J. L. Denison, for plaintiffs in error Missouri, K. & T. Ry. Co. and another.*

*Trimble & Braley and John A. Eaton, for plaintiff in error Kansas City Suburban Belt R. Co.*

Missouri, K. & T. Ry. Co. v. Merrill

*Angevine & Cubbison*, for defendant in error Merrill.

*Angevine & Cubbison, T. N. Sedgwick, and Silas Porter*,  
for defendant in error Missouri, K. & T. Ry. Co.

SMITH, J. (after stating the facts). Plaintiffs in error deny the right of plaintiff below to recover at all under the petition. It is insisted that, if entitled to damages, he must look to the Chicago Great Western Railway, by which he was employed at the time of the accident. We cannot agree with them in the position taken. When the iron pipe was received by the Missouri, Kansas & Texas Company, at St. Louis, as freight for transportation to St. Joseph, Mo., it was contemplated that the car in which it was loaded should be delivered at Kansas City to a connecting carrier, for the reason that the receiving company had no line from Kansas City to the place of destination. It was known also that connecting carriers employ switchmen, and that they are necessary to the work of making up trains. With this knowledge it was the duty of both the plaintiffs in error to provide a car which would be reasonably safe for the service to be performed and for employees of connecting lines to handle, to the end that freight might be expeditiously carried to its destination. The first carrier owed a duty to the employees of the second, and both to the third, to the extent that the car transported should be in such reasonable repair that in switching it no harm should result to the employees of the latter railroad company in performing such work. While no proof was made showing what route the car was to take from Kansas City to St. Joseph, yet it was intended that it should be forwarded over some one of the lines running between the two cities. It was never contemplated that it should be unloaded at Kansas City, and the contents transferred to a car belonging to a connecting line. This would be an expensive and unusual practice, contrary to modern methods of handling such freight.

Negligence on the part of the Chicago Great Western Railway Company will not excuse the plaintiffs in error

Missouri, K. &amp; T. Ry. Co. v. Merrill

either for their failure to inspect, or, having inspected the car, permitting it to be delivered to a connecting line in a condition which might be dangerous to switchmen and other employees engaged in the practical part of the business of railway transportation. The question is whether plaintiffs in error were negligent. This is not

Injury to  
Employee—Neg-  
ligence in Load-  
ing Cars—Failure  
to Inspect—Con-  
current Negligence—Liability  
of Connecting  
Carriers.

determined by a showing that another company was equally or more careless. *Railroad Co. v. Snyder*, 55 Ohio St. 342, 45 N. E. 559; *Moon v. Railroad Co.*, 46 Minn. 106, 48 N. W. 679; *Railway Co. v. Booth*, 98 Ga. 20, 25 S. E. 928; *Horne v. Meakin*, 115 Mass. 326; *Heaven v. Pender*, 11 Q. B. Div. 503; *Thrussell v. Handyside*, 20 Q. B. Div. 359; *Elliott v. Hall*, 15 Q. B. Div. 315. Neglect of such duty cannot be justified or excused on the ground that no contractual relation existed between the person injured and the parties guilty of the negligent acts. *Garnett v. Bridge Co. (C. C.)*, 98 Fed. 192. Railway companies are required to receive and transport freight cars offered for that purpose which are of a gauge adapted to their lines. The necessities of commerce demand this. *Railroad Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Peoria & P. U. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 109 Ill. 135; *Railroad Co. v. Boland*, 96 Ala. 626, 11 South. 667, 18 L. R. A. 260.

Under the facts developed at the trial we do not feel justified in determining as a matter of law that the conduct of the defendant in error in his effort to go from the coal car to the box car in the manner he did was negligent to a degree preventing a recovery. The cars were in motion. He had a duty to perform, which required his passing from one car to another. This involved a climbing up from a flat to a box car, and going over the space between the two where they were coupled together. The end gate could have been held up securely in a rigid position by the use of hooks and eye bolts, which the proof showed are usually employed for that purpose. The cleats used were an imperfect substitute for such appliances. It appeared from the testimony that these cleats were ren-

## Missouri, K. &amp; T. Ry. Co. v. Merrill

dered ineffective for the purpose intended by the pressure of the load pushing the side boards away from the ends of the end gate, and permitting the latter to fall inward past the cleats. While the attempt of plaintiff below, by standing on the end gate, to reach over to the ladder of the box car on the outside of the curve, a distance of four feet, seems to us to be a careless manner of crossing, yet we think it would be an unwarranted interference with the province of the jury to so declare as a matter of law, in view of the duties the defendant in error was called upon to perform considering his surroundings at the time. Plaintiffs in error contend that there was a safe and unsafe way of going from the coal car to the box car, and that Merrill adopted the latter. It does not stand out clear from the testimony in the record that the way which plaintiffs in error would have had Merrill make the crossing was the safer one. No instruction was asked by defendants below, nor any given, to the effect that, if there was a safe and unsafe way of going from the one car to the other, plaintiff below must employ the former. While we might conclude that Merrill, by stepping down upon the platform between the end gate and the box car, could have gone over safely, yet there are no findings of the jury upon that subject. The comparative danger would have been more prominently in the case had the expert testimony referred to hereafter been admitted. If the end gate had been solid, no accident would, in all probability, have happened. Had it remained firm, Merrill might have reached over to the ladder on the box car with safety. Nor can we hold that plaintiff below was guilty of contributory negligence in failing to observe, under the circumstances and in the presence of duties he was required to perform, that hooks and eye bolts were lacking to hold up the end gate upon which he stepped. *Railroad Co. v. Snyder, supra*. In *Beaver v. Railroad Co.*, 56 Kan. 514, 43 Pac. 1136, it is said: "In an action to recover for personal injuries, where the defense is contributory negligence on the part of the plaintiff, the court cannot take the case from the jury, and determine as

## Missouri, K. &amp; T. Ry. Co. v. Merrill

a matter of law that the plaintiff was negligent, where the standard of care required of him was a subject upon which different opinions might be entertained, and where the facts shown and inferences to be drawn from them were such that reasonable minds might differ with respect to whether he had acted as a reasonably prudent man should have done under the circumstances." Walking over a train of flat cars while the same are in motion, or stepping from one of such cars to another while the train is moving, is not negligence *per se*. Railroad Co. v. McCandliss, 33 Kan. 366, 6 Pac. 587; Snow v. Railroad Co., 8 Allen 441.

The claim that the two railroad companies, defendants below, could not be joined in the action is without merit. The negligence of the three was concurrent, and plaintiff below might have sued the three jointly, or one or more separately. Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706; Railway Co. v. Posten, 59 Kan. 449, 53 Pac. 465; Railway Co. v. Martin, 59 Kan. 437, 53 Pac. 461; Kansas City v. File, 60 Kan. 157, 55 Pac. 877. All were engaged in a common purpose, *viz.* the transportation of the gas pipe and the car in which it was loaded from St. Louis to St. Joseph. If the Missouri, Kansas & Texas Company had not furnished the defective car, the accident would not have happened. The other companies contributed to the injury of Merrill by failing in their duties to inspect the same, or, having examined it, in neglecting to give warning of its defective condition. Railroad Co. v. Snyder, *subra*. One Pottinger, a competent railroad man with many years of experience, was a witness on behalf of the defendants below.

He testified that he was familiar with coal cars like the one in question. The following hypothetical question was propounded to him: "Supposing that the end gate was 18 or 20 inches from the end of the car, leaving a platform 18 or 20 inches on the outside of the end gate. The car was loaded with pipe, say 6 or 8 inch gas or water pipe. In simply passing over that car, and in attempting to get upon a box car in front with

Expert Testimony.

## Missouri, K. &amp; T. Ry. Co. v. Merrill

a ladder upon the side of the box car, now you may state to the jury what would be the proper position or proper steps for an employee to take in order to get upon that box car in the event that the car was moving at the rate of about 4 miles an hour." The court below sustained an objection to the question, and the witness was not permitted to answer. To pass safely from one moving freight car to another, under the conditions presented by the facts before us, requires skill, and a knowledge of the business of rail-roading beyond that possessed by the casual observer, who has had no training in such vocation. Certain methods, derived from experience, are known to those engaged in the operation and management of railway cars and trains as customary, safe, and practical in moving along and over freight cars in motion, a disregard of which is fraught with danger, owing to the hazardous nature of the employment. The business may be classed as a technical one, requiring peculiar knowledge and training as a condition to its successful prosecution. The witness was not asked to give his conclusion as to whether or not Merrill was guilty of negligence in attempting to cross from one car to the other in the manner attempted. His opinion was sought regarding the proper position or proper step for an employee to take in order to reach the box car. We think the opinion of the expert was admissible. If the jury could have decided from the facts detailed the matter involved in the hypothetical question, and arrived at a proper conclusion without the aid of expert testimony, then the position taken by the court below would have been right. It should be the aim of courts to assist the jury in arriving at the truth. The train was in motion, and the proper course to be taken by a switchman in going from one car to the other under such circumstances, considering the difference in height of the two cars and all the surroundings, was a matter fairly within the range of expert testimony. It cannot be said that the ordinary jurymen would not be assisted in making up his verdict by the aid of the testimony of the witness. Nor can we assume

## Missouri, K. &amp; T. Ry. Co. v. Merrill

that the jury was as competent as the expert to draw a conclusion from the facts. Such testimony is excluded only in cases where the jury are considered equally competent with the witness to judge of the situation. As to the propriety of such evidence, see *Lawson, Exp. Ev.* p. 86; *Rog. Exp. Test.* §§ 6, 7; *Railroad Co. v. Smith*, 22 Ohio St. 227; *Cooper v. Railroad Co.*, 44 Iowa 134; *Seliger v. Bastian*, 66 Wis. 521, 29 N. W. 244; *Hayes v. Southern Pac. Co.* (Utah), 53 Pac. 1001; *Bier v. Manufacturing Co.*, 130 Pa. St. 446, 18 Atl. 637; *Railway Co. v. Novak*, 9 C. C. A. 629, 61 Fed. 573; *Olmscheid v. Lumber Co.* 66 Minn. 61, 68 N. W. 605; *Goins v. Railroad Co.*, 47 Mo. App. 173; *Railway Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742; *Leslie v. Railroad Co.*, 172 Mass. 468, 52 N. E. 542. In *Ferguson v. Hubbell* 97 N. Y. 507-513, the rule regarding the competency of such testimony is thus stated: "It is not sufficient, to warrant the introduction of expert evidence, that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it than the jury; but to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have." The cases of *Railway Co. v. Peavey*, 29 Kan. 169, and *Railway Co. v. Robbins*, 43 Kan. 145, 23 Pac. 113, cited by defendant in error, do not cover the question involved here. In the one the plaintiff Peavey was asked whether, in his opinion, he would have been injured if the car had approached him at the usual and proper rate of speed for making couplings; and another witness, testifying for him, was asked to state whether brakemen, in making couplings, are not compelled to rely to a great extent upon the prudence of the person handling the engine. In the other a witness was interrogated as to the practice followed by other employees in ascending the ladder of a box car. This was held to create



## Notes

a collateral issue. The admission of expert testimony was not involved in the latter case.

The following instruction given by the court to the jury seems to us to be misleading. It reads: "(12) The burden of proof is upon the defendants to prove by a preponderance

Instructions. of the evidence that the plaintiff was careless and negligent, and that his carelessness and negligence directly contributed to the injury which he received; and if the evidence upon such matters, if any there be, is evenly balanced, or if it preponderates in favor of the plaintiff, then the defendant failing to prove by a preponderance of the evidence that the plaintiff was guilty of contributory negligence cannot defeat the claim of the plaintiff upon that ground." This direction left the impression that, unless the defendants below by their evidence established contributory negligence, the defense of such contributory negligence must fall. If the testimony introduced on behalf of Merrill showed that the injury was the result of his own negligence, then there could be no recovery, even if the opposite party introduced no evidence upon that subject. *Dewald v. Railroad Co.*, 44 Kan. 586, 24 Pac. 1101, and cases cited. We think this should have been made clear to the jury. *Beach, Contrib. Neg.* § 427, and cases cited; *Gibson v. City of Wyandotte*, 20 Kan. 156-158. The judgment of the court below will be reversed, and a new trial is ordered. All the justices concurring.

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## NOTES.

**Inspection of Cars—Liability for Injury to Employee by Negligence of Another Company.**—Where, as between connecting lines, the corporations controlling them are mutually bound to transport loaded freight cars over their respective roads, such duty is necessarily subject to proper rules and regulations, and involves mutual obligations, among which is that of due diligence to provide safe cars for delivery to the servants of the company operating the connecting line to which they are transferred, and who would be exposed to danger from their defective or unsafe condition, and where a brake upon a freight car transferred by the corporation owning it is out of repair and unsafe for use, and the same had not been in-

## Notes

spected with due care before delivery to the servants of a connecting company, and in consequence of such defect a brakeman of such company is injured without fault on his part, an action will lie for the injury against the first-named company. *Moon v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 195, 46 Minn. 106, 48 N. W. Rep. 679.

**Inspection of Foreign Cars.**—See *Alabama, etc., R. Co. v. Carroll* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 759, and *note*, 780 *et seq.*

**Expert Testimony—Proper Position of Brakeman on Train.**—In *Cincinnati & Q. R. Co. v. Smith*, 22 Ohio St. 227, an experienced railroad man was permitted to testify as an expert as to the proper position of brakemen on a train. But the cases in which evidence offered as expert testimony has been refused are numerous. These proceed as already stated upon the ground that the subject matter is one of common knowledge and not involving any particular skill or training. A brakeman is not competent to express his opinion as an expert as to the proper and safe method of coupling cars. *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31; *Belair v. Chicago and N. W. R. Co.*, 43 Iowa 662.

A conductor cannot be called upon to testify as an expert as to whether the conduct of a brakeman in the performance of his duty was reasonably prudent and careful. *Gavisk v. Pacific R. R. Co.*, 49 Mo. 274.

Where an accident happened to a train in consequence of the dangerous condition of a bridge, the evidence of the company's bridge builder as an expert was held inadmissible to show that at the time of the accident the bridge was safe. *Toledo, P. & W. R. Co. v. Conroy*, 68 Ill. 560. But this case would seem to go to the very extreme point of the law and may be doubted. See *Union Pac. R. Co. v. Clopper*, 2 Am. & Eng. R. Cas. 649.

A person who has had a long experience as a railroad superintendent has been held incompetent to testify as to the meaning of a notice posted in the cars. *Macon & Western R. Co. v. Johnson*, 38 Ga. 409.

Expert evidence is not admissible to show whether a train stopped long enough to allow passengers to alight. *Keller v. N. Y. Cent. R. Co.*, 2 Abbott Ct. App. 480.

Whether the company employed a sufficient number of brakemen. *Harvey v. New York Cent. & H. R. R. Co.*, 19 Hun 566.

Whether the blowing of a whistle was safe and prudent with reference to travel on a highway. *Hill v. Portland & R. Co.*, 55 Me. 438.

Or what the custom of other companies was in that respect. *Hill v. Portland & R. R. Co.*, 55 Me. 438; *Koons v. St. Louis & I. M. R.*

## Glynn v. Central R. R. of New Jersey

Co., 65 Mo. 592; *Bailey v. New Haven & N. R. Co.*, 107 Mass. 496. See, however, *Quimby v. Vt. Central R. Co.*, 23 Vt. 387; *Illinois Cent. R. Co. v. Reedy*, 17 Ill. 580.

It has also been held inadmissible where the question raised is the safety of a locomotive and tender of a certain pattern. *Way v. Illinois Central R. Co.*, 40 Ill. 341.

And also whether or not a turntable is a dangerous machine, and whether it is perilous and negligent to leave the same unlocked. *Koons v. St. Louis & Iron Mt. R. Co.*, 65 Mo. 592.

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GLYNN

v.

## CENTRAL R. R. OF NEW JERSEY.

(*Supreme Judicial Court of Massachusetts, March 3, 1900.*)

**Inspection of Cars—Liability of Transferring Company.\***—A railroad transferring one of its cars to another company cannot be held liable for an injury to an employee of the latter, caused, after the car had passed from its control and beyond the inspection point of the receiving company, by a defect in such car existing before its transfer.

EXCEPTIONS by defendant from Suffolk county superior court. *Overruled.*

*S. A. Fuller* and *G. W. Anderson*, for plaintiff.

*Benton & Choate* and *Robt. Thorne*, for defendant.

HOLMES, C. J. This is an action for personal injuries. The plaintiff was at work for the New York, New Haven & Hartford Railroad Company at Stonington, Conn., and was engaged in coupling a train to a car belonging to the defendant, when his sleeve was caught by a bolt projecting from the deadwood of the car, and his hand was crushed. We assume that the car was in such a condition that, apart from the question of notice, it would have warranted a finding that the defendant was liable had the car been in its possession,

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\*See note at end of case.

Glynn v. Central R. R. of New Jersey

and the plaintiff in its employ. We assume further, without deciding, that the evidence warranted a finding that the car had come from the possession of the defendant recently, and in the same condition as that in which it was at the time of the accident. But, nevertheless, we are of opinion that the judge who tried the case was right in directing a verdict for the defendant.

There was no dispute that, after the car had come into the hands of the New York, New Haven & Hartford Railroad, and before it had reached the place of accident, it had passed a point at which the cars were inspected. After that point, if not before, we are of opinion that the defendant's responsibility for the defect in the car was at an end.

There is more obscurity than there ought to be, perhaps, upon the limits of liability in general. The fact that the damage complained of would not have happened but for the intervening negligence of a third person has not always been held a bar, although negligent conduct, so far as it is a tort, is unlawful in as full a sense as malicious conduct, and although, ordinarily, even a wrongdoer would not be bound to anticipate a willful wrong by a third person. See *Elmer v. Locke*, 135 Mass. 575, 576, and cases cited in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 48, 15 N. E. 84; *Engelhart v. Farrant* [1897] 1 Q. B. 240. Compare *Hayes v. Inhabitants of Hyde Park*, 153 Mass. 514-516, 27 N. E. 522. But when a person is to be charged because of the construction or ownership of an object which causes damage by some defect, commonly the liability is held to end when the control of the object is changed.

Thus, the case of *Clifford v. Atlantic Cotton Mills*, just cited, shows that the mere ownership of a house so constructed that its roof would throw snow into the street, and therefore threatening danger as it is, without more, whenever snow shall fall, is not enough to impose liability when the control of it has been given up to a lessee, who, if he does his duty, will keep it safe. In the case at bar the car did not threaten harm to any one, unless it was used in a particu-

*Glynn v. Central R. R. of New Jersey*

lar way. Whether it should be used in a dangerous way or not depended, not upon the defendant, but upon another road. Even assuming that the car had come straight from the defendant at Harlem River, the defendant did no unlawful act in handing it over. Whatever may be said as to the responsibility for a car dispatched over a connecting road before there has been a reasonable chance to inspect it, after the connecting road has had the chance to inspect the car, and has full control over it, the owner's responsibility for a defect which is not secret ceases. See *Sawyer v. Railway Co.*, 38 Minn. 103, 35 N. W. 671; *Wright v. Canal Co.*, 40 Hun 343; *Mackin v. Railroad Co.*, 135 Mass. 201, 206.

Upon the same principle that commonly, when a new control comes in, the former responsibility is at an end, a vendor who makes no representation is not liable to a remote purchaser of the article sold for damage done by defects in it. *Davidson v. Nichols*, 11 Allen 514, 518; *Losee v. Clute*, 51 N. Y. 494; *Curtin v. Somerset*, 140 Pa. St. 70, 21 Atl. 244, 12 L. R. A. 322; *Necker v. Harvey*, 49 Mich. 517, 519, 14 N. W. 503. An extreme case is *Collis v. Selden*, L. R. 3 C. P. 495.

It is recognized in *Clifford v. Atlantic Cotton Mills* that the rule is different when the use from which the damage ensued plainly was contemplated by the lease. *Jackman v. Arlington Mills*, 137 Mass. 277; *Harris v. James*, 45 Law J. Q. B. 545. See *Devlin v. Smith*, 89 N. Y. 470. In *Heaven v. Pender*, 11 Q. B. Div. 503, 515, it was considered that the use not only was contemplated, but was invited. See *Blakenmore v. Railway Co.*, 8 El. & Bl. 1035, 1052, 1053. But contemplation means a good deal more than simply recognizing a probability. In *Sowell v. Champion*, 2 Nev. & P. 627, 634, it was held that an act generally lawful, such as placing a writ for execution in the hands of an officer, was not made unlawful by a full persuasion, or even knowledge, that the officer was likely to execute it in a place which might and did turn out to be out of his jurisdiction. The officer had an unfettered right of decision, and it was his lookout to see

## Note

that he kept within the law. See *Kahl v. Love*, 37 N. J. Law 5; *Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621. So here as to the car. There has been a suggestion in some cases of a more severe rule in the case of very dangerous agencies. *Loop v. Litchfield*, 42 N. Y. 351; *Goodlander Mill Co. v. Standard Oil Co.*, 11 C. C. A. 253, 63 Fed. 400. But, whether there be any such qualifications or not, the present case is not within it. If it had appeared that the use made of the car was contemplated by the defendant, it still would have been a use subject to inspection, and of a car with no secret defect.

By a Connecticut statute of 1895 (chapter 176) no action for damages in a case like the present can be maintained unless a notice of the claim, etc., is given to the defendant company within four months. If this be construed as going only to the remedy, no doubt it is local, and is not a bar to the present action. But, if it applies to the present case, and goes to the substantive right, it is a bar. An act done and having its consequences within a civilized jurisdiction, and lawful or free from liability there, is not actionable elsewhere. *Higgins v. Railroad Co.*, 155 Mass. 176, 179, 48 Am. & Eng. R. Cas. 512, 29 N. E. 534. We say so much because it was argued that the Connecticut statute could not control the action of the court. But, in view of what we have said, it is unnecessary to consider which is the true view of the statute. It also is unnecessary to consider any question of evidence which was argued. Exceptions overruled.

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NOTE.

**Inspection of Cars—Liability of Transferring Company.**—Plaintiff was injured in consequence of a defective stepladder on one of defendant's freight cars. He was not at the time in the service of the defendant, but of another company, which was then using the car in its own business. The car had been sent over the road of the latter company, which connects with that of the defendant, consigned to a point in another state; but on its return, it was transferred beyond the point of junction at which it should have been returned to defend-

## Baldwin v. Atlantic City R. Co

ent, and was loaded with freight consigned to a distant point on such connecting road. *Held*, that the defendant owed no duty to the plaintiff in respect to the condition of the car, growing out of contract or otherwise, and that this action cannot be maintained. *Sawyer v. Minneapolis & St. L. R. Co.*, 33 Am. & Eng. R. Cas. 394, 38 Minn. 103, 35 N. W. Rep. 671, 8 Am. St. Rep. 648.

## BALDWIN

v.

## ATLANTIC CITY R. CO.

(*Court of Errors and Appeals of New Jersey, March 5, 1900.*)

**Injury to Employee—Appliances—Care Required of Master.\*—**  
The duty of a master to his servant is to take reasonable care that the tools with which and the places about which the servant is to work shall be reasonably safe for the servant's use; but the mere fact that an appliance furnished by the master and used by the servant turned out to be unsafe will not establish the liability of the master for the injury received thereby, unless the circumstances justify an inference that the master had not used the reasonable care required of him.

DIXON, J., dissenting.  
(Syllabus by the Court).

**ERROR** by plaintiff to supreme court. *Affirmed.*

*John A. Westcott*, for plaintiff in error.

*Willard Morgan*, for defendant in error.

MAGIE, C. J. The record brought up by this writ discloses an action in tort by plaintiff in error to recover damages for a personal injury. Plaintiff's declaration founded his right to recover upon the following averments, *viz.* That he was in the employ of the defendant company as a brakeman; that it was his duty to step upon one of defendant's freight cars by means of a foot-step attached thereto; that the foot-step was broken, out of repair, and unfit for the use

\*See notes at end of case.

## Baldwin v. Atlantic City R. Co

which plaintiff was obliged to make of it; that the defendant company knew of such condition of the foot-step, but that plaintiff was ignorant thereof; and that, while plaintiff was thus using the foot-step, by reason of its faulty condition he slipped therefrom, and fell on the track in front of the wheel of the moving car, by which one leg was cut off. The defendant pleaded the general issue, and another plea which need not be considered. The issue came on for trial before MR. JUSTICE GARRISON, at the Gloucester circuit. At the close of plaintiff's case, the trial judge, being of opinion that the evidence adduced by plaintiff would not justify a verdict in his favor, upon defendant's motion directed a nonsuit, whereon this judgment was entered.

The single question presented by the bill of exceptions is whether the nonsuit was proper. From the evidence contained in the bill of exceptions, it appears that plaintiff, on December 9, 1893, was in the employ of the defendant company as brakeman. It may be inferred, although the evidence to that effect is very meager, that he was engaged in his employment on that day as a brakeman upon a freight train hauled by the defendant company on its road, and that about 7 o'clock in the evening he received the serious injury of which he complained. The sole evidence tending to charge the defendant company with liability for that injury is contained in the following sentences of plaintiff's testimony given on his direct examination, *viz.*: "Well, I went to board the train. I made the cut, and went on towards the train,—towards the switch; and then I went to board the train, and as I got on the train the step gave way with me,—either gave way or turned under. It let me fall back. Just turned right under, and cut my foot off,"—and the answer given by him when asked on cross-examination, "What was the matter with the step of the car? *viz.*: "The step was loose, and it gave way when I stepped on it." The contention on the part of plaintiff is thus stated in the brief of counsel, *viz.*: "The master is bound to furnish his servant reasonably safe tools. \* \* \* Therefore the affirma-



## Baldwin v. Atlantic City R. Co

tive on the plaintiff is to establish that he was injured by the use of an instrument not reasonably safe. \* \* \* The master in this case did injure his servant by an unreasonably defective tool; therefore the master is liable." This argument is based on an incorrect premise. It is incorrect to characterize the master's duty to the servant as an absolute duty to furnish his servant with reasonably safe implements and appliances. On the contrary, it has been settled by many concurring decisions in this court and the supreme court that the master's duty does not require him to insure the reasonable safety of tools with which, or places about which, his servant is employed, but will be satisfied by his exercising reasonable care that such tools and places shall be reasonably safe for his workmen's use. *Fenderson v. Railroad Co.*, 56 N. J. Law, 708, 31 Atl. 767; *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. 619; *Comben v. Stone Co.*, 59 N. J. Law, 226, 36 Atl. 473; *Electric Co. v. Kelly*, 60 N. J. Law, 360, 37 Atl. 619; *Id.*, 61 N. J. Law, 289, 41 Atl. 1115; *Id.*, 57 N. J. Law, 100, 29 Atl. 427; *Atz v. Manufacturing Co.*, 59 N. J. Law, 41, 34 Atl. 980; *Stone Co. v. Comben*, 61 N. J. Law, 353, 39 Atl. 641; *Id.*, 62 N. J. Law, 449, 45 Atl. —.

The mere fact that an appliance furnished by the master and used by the servant turned out to be unsafe will not evince the master's liability for the injury resulting from its use, unless the circumstances established by the evidence justify the inference that the master had not used reasonable care in originally procuring the appliance, or in observing its condition, and keeping it reasonably safe for use. Such was the conclusion of this court in *Fenderson v. Railroad Co.*, *ubi supra*. In that case the plaintiff's injury was occasioned by the breaking of a coupler, and the only proof offered to establish the liability of the company was the fact that the coupler broke. A nonsuit was sustained in this court on the ground that the evidence was insufficient to warrant a verdict charging negligence on the employer. The case before us presents the same feature, and the trial

## Notes

judge rightly applied it when he decided the motion for non-suit in this case. The judgment must be affirmed.

DIXON, J. At the trial the plaintiff proved that, in the course of his duty as a brakeman employed by the defendant, he attempted in the nighttime to get on a freight car in the defendant's train; that the step of the car was loose, and turned as he placed his weight upon it, so that he fell and was injured. On this proof he was nonsuited, for lack of evidence of negligence in the defendant. I think he presented a case for the jury. The car, being in defendant's possession, was presumptively the defendant's car, or, at least, one as to which, when placed in the defendant's train, it was chargeable with an employer's duty towards the employees. When the plaintiff proved that the step was so loose as to turn under his weight, he established a probability that it had been defective for some time, and to an extent discoverable by careful inspection; for the step of a car is not ordinarily subject to sudden and severe strains, but is liable to become defective gradually and perceptibly. Against the danger arising from such liability the only practicable safeguard for a brakeman is to be found in the employer's duty of inspection and repair, and I think in the present case the plaintiff was entitled to have submitted to the jury the question whether that duty had been performed by the defendant.

## NOTES.

**Care Required of Master.**—See generally *McGeary v. Old Colony R. R.* (R. I.), 14 Am. & Eng. R. Cas., N. S., 764, and *note*, 767 *et seq.*

**Same—Safe Place to Work.**—See generally *note*, 12 Am. & Eng. R. Cas., N. S., 537.

**Master's Duty to Furnish Safe Track and Machinery—Degree of Care.**—See *Chicago, etc., R. Co. v. Oyster* (Neb.), 12 Am. & Eng. R. Cas., N. S., 655, and *note*, 668 *et seq.*

**Master and Servant—Defective Appliances—Notice of Defects—Burden of Proof.**—See *note*, 12 Am. & Eng. R. Cas., N. S., 744 *et seq.*

Haver v. Central R. Co. of New Jersey

HAVER

v.

CENTRAL R. CO. OF NEW JERSEY.

*(Court of Errors and Appeals of New Jersey, March 8, 1900.)*

**Impeachment of Witness.**—The credit of a witness may be attacked either by his own cross-examination or by calling other witnesses for the purpose.

**Liability for Acts of Servant—Wantonness and Malice—Punitive Damages.\***—A master, though liable to make compensation for injuries done by his servant within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent on the part of the servant.

**Same—Ejection of Passenger—Use of Unnecessary Force.\***—If a train hand, in repelling an assault made upon him by a passenger, uses more force than is reasonably necessary for the purpose of defending himself from the attack and ejecting the passenger from the company's train, the company is liable for damages resulting from such excess of violence.

*(Syllabus by the Court.)*

**ERROR** by plaintiff to Hudson county circuit court.  
*Reversed.*

*Roberson & Demarest*, for plaintiff in error.

*George Holmes*, for defendant in error.

GUMMERE, J. The plaintiff in error brought this suit to recover from the defendant corporation for personal injuries which he claimed to have received while traveling upon one of the company's trains. The injuries were the result of an assault, which he alleged was committed upon him by the baggage master of the train without cause or provocation. The trial resulted in a verdict for the defendant, and plaintiff in error now seeks to set aside the judgment entered upon that

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\*See notes at end of case.

*Haver v. Central R. Co. of New Jersey*

verdict on account of certain errors, which, as he says, occurred at the trial.

The first error assigned relates to the exclusion of evidence. The defendant having produced and examined as a witness the baggage master who was charged with having committed the assault, and he having testified on his direct examination that the plaintiff in error was the aggressor in the trouble between them, and that he (witness) merely defended himself against the latter's attack, was asked, on his cross-examination, whether he was not afraid that he would lose his position with the company in case a verdict was rendered against it. The question, having <sup>Impeachment of Witness.</sup> been objected to by the defendant, was overruled by the trial judge, and an exception to the ruling allowed the plaintiff. We think it was an error to sustain this objection. The effect of the baggage master's testimony, if true, would have been to entirely relieve the defendant from liability; and it was, consequently, not only material, but necessary, for the plaintiff's case to discredit his testimony. It was competent to do this either by calling other witnesses to prove that he was unworthy of belief, or by the cross-examination of the witness himself, for the purpose of showing the existence of any fact which would tend to throw doubt upon the accuracy of his evidence. *People v. Brooks*, 131 N. Y. 325, 30 N. E. 189. That interest in the result of a suit is apt to produce bias on the part of a witness must be conceded, and that the bias of a witness may be shown for the purpose of discrediting him is elementary law. *Jones*, Ev. § 826.

The other assignments of error relate to the charge to the jury. On the question of the measure of damages the court charged as follows: "Before you can assess exemplary damages, you must find that a malicious and wanton assault was committed by the baggage master upon the plaintiff, and that the defendant company knew of the character of their employee, and that such an assault would be naturally expected from such a man." This instruction is excepted to, because, as

Liability for Acts  
of Servant—Wan-  
tonness and Mal-  
ice—Punitive  
Damages.

## Haver v. Central R. Co. of New Jersey

is claimed by the plaintiff, exemplary damages should have been awarded, if the assault was wanton and malicious, without regard to the knowledge of the defendant of the character of its employee. Exemplary damages, being awarded, not for the benefit of the injured party, but for the purpose of punishing the wrongdoer, can only be assessed against one who has taken part in the wrongful act. A master, therefore, though liable to make compensation for injuries done by his servant within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent on the part of the servant. *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. The rule on this subject is thus stated by MR. JUSTICE GARRISON, speaking for the supreme court in the case of *Forthman v. Traction Co.*, 43 Atl. 892: "A principal, whether an individual or a corporation, cannot be charged with punitive damages for the illegal, wanton, or oppressive conduct of a servant, unless the principal participated in the wrongful act of the servant, either expressly or impliedly, by his conduct, authorizing or approving it either before or after it was committed." As is shown by the opinion in *Railway Co. v. Prentice*, *supra*, the decided cases are not at one upon this question. The weight of authority, however, as well as reason and justice, seem to us to support the conclusion expressed by the supreme court of the United States and our own supreme court. The responsibility of the defendant in this case, as has already been decided by this court, does not depend upon the law of liability of a master for the acts of his servants, but upon the duty imposed upon the railroad company to safely and securely carry its passengers. *Haver v. Railroad Co.*, 62 N. J. Law, 284, 41 Atl. 916, 43 L. R. A. 84. But its liability to be charged with punitive damages must be determined by the principle above stated, and can only exist by reason of its having maliciously and wantonly violated its duty to the plaintiff as a common carrier by participating, either expressly or impliedly, in the wrongful

## Notes

act of its servant, either by authorizing it before or by approving it after it was committed. The charge of the trial court upon the subject of exemplary damages, therefore, was not strictly accurate. We are unable, however, to see how this inaccuracy in the instruction to the jury could have worked injury to the plaintiff, for there was nothing in the case submitted to us to justify a finding that the defendant participated in the alleged wrongful act of its servant, either by authorizing it before it was committed or by approving it afterwards.

The only other assignment of error which requires consideration is based upon an exception to the following instruction to the jury: "You cannot find for the plaintiff unless you find the baggage master assaulted the plaintiff without cause or provocation on the part of the plaintiff." This instruction <sup>Same—Ejection of Passenger—Use of Unnecessary Force.</sup> was erroneous. Even if the plaintiff had been the original aggressor, the baggage master would have been justified in using only such force as was necessary to repel the plaintiff's attack and to eject him from the train. If, in defending himself from that attack, or in attempting to put plaintiff off the train, he used more violence than was reasonably necessary for the purpose, the defendant company was liable for damages resulting from such excess of violence. *Jardine v. Cornell*, 50 N. J. Law, 485, 14 Atl. 590. The judgment of the circuit court should be reversed.

## NOTES.

**Injuries to Passengers from Malicious Acts of Employees—Liability of Master.**—See *Haver v. Central R. Co.* (N. J.), 12 Am. & Eng. R. Cas., N. S., 261, and extensive *note*, 266 *et seq.*

**Same—Exemplary Damages for Act of Servant.**—See *Gillman v. Florida Cent. & P. R. Co.* (S. Car.), 12 Am. & Eng. R. Cas., N. S., 125, and *note*, 131 *et seq.*

**Liability of Carrier for Servant's Assault on Passenger.**—See *St. Louis S. W. Ry. Co. v. Berger* (Ark.), 10 Am. & Eng. R. Cas., N. S., 235, and *note*, 249 *et seq.*

**Liability of Master for Torts of Servant Committed outside Scope of Employment.**—See *Kincade v. Chicago, etc., Ry. Co.* (Iowa), 14 Am. & Eng. R. Cas., N. S., 539, and *note*, 562 *et seq.*

Medberry v. Chicago, etc., Ry. Co

## MEDBERRY

v.

CHICAGO, M. &amp; ST. P. RY. CO.

*(Supreme Court of Wisconsin, Jan. 9, 1900.)*

**Injury to Employee while "Operating Train"—Recovery for Negligence of Fellow Servant—Statute.\*—**While a conductor, in the discharge of his duties, was standing by the side of a car, watching a switch, and waiting to close the door of the car when it should be unloaded, he was struck and injured by a bale of felt, through the negligence of co-employees in unloading the freight from such car. **Held**, that the conductor, when injured, was not engaged in "operating, running, riding upon, or switching" the train, engine, or car, within the meaning of the statute of Wisconsin under which an employee may recover against the master for an injury sustained by him through the negligence of his fellow servants.

**APPEAL** by plaintiff from Walworth county circuit court.  
*Affirmed.*

*Ingalls & Ingalls*, for appellant.

*C. B. Sumner and H. H. Field*, for respondent.

**CASSODAY, C. J.** This is an appeal from an order sustaining a demurrer to a complaint for personal injury, alleging, in effect, that the plaintiff at the time of the injury, and for 25 years prior thereto, had been in the employment of the

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\*See *Reddington v. Chicago, M. & St. P. Ry. Co.* (Iowa), 14 Am. & Eng. R. Cas., N. S., 563; *Akeson v. Chicago, etc., R. Co.* (Iowa), 11 *Id.* 430. See also *Egan v. Chicago, etc., Ry. Co.* (Wis.), 9 *Id.* 475, and *note*, p. 481; *Keatley v. Illinois C. R. Co.* (Iowa), 9 *Id.* 1, and *note*, p. 9; *Stroble v. Chicago, etc., R. Co.*, 70 Iowa 555, 59 Am. Rep. 456; *Smith v. Burlington, etc., R. Co.*, 59 Iowa 73; *Luce v. Chicago, etc., R. Co.*, 67 Iowa 75; *Union Pac. R. Co. v. Harris*, 33 Kan. 416; *Atchison, etc., R. Co. v. Koehler*, 37 Kan. 463; *Atchison, etc., R. Co. v. Brassfield*, 51 Kan. 167; *Chicago, etc., R. Co. v. Pontius*, 52 Kan. 264, *affirmed in* 157 U. S. 209; *Pearson v. Chicago, etc., R. Co.*, 47 Minn. 9.

Medberry v. Chicago, etc., Ry. Co

defendant as a conductor in charge of a train running between Elkhorn and the village of Eagle; that such train was known as a "combination," "mixed," or "passenger" train, consisting of freight and passenger cars, engine, etc.; that during all of the time of the plaintiff's employment as such conductor it was a part of his regular duty to see to the making up of such train at the terminal points, and to get the same in readiness to leave such points upon scheduled time; that December 23, 1896, the plaintiff, in the regular discharge of his duties as such conductor, was engaged in the making up of his train preparatory to leaving Elkhorn on one of its regular trips; that it became necessary for the plaintiff, in the discharge of his duties as such conductor, to have a certain car, which was to compose and become a part of such train, unloaded at the freight depot at the station at Elkhorn prior to the leaving of the train; that in the performance of such duty as such conductor the plaintiff caused such car to be put into the train, and drawn up beside the freight depot at the station at Elkhorn for the purpose of having the freight then in the car unloaded upon the platform; that it was the plaintiff's duty to see that the door of the car was properly closed and fastened after such freight had been unloaded, and to give proper signals to the engineer of the train when such work should be accomplished; that two co-employees of the plaintiff were engaged in taking out the freight in the car, and that the plaintiff, while in the performance of his duty as such conductor, was standing by the side of the car so being unloaded for the purpose of watching an open switch easterly from the train connecting the main lines of the railway with the track upon which the plaintiff's train was standing, and for the purpose of closing the car door when the freight should be unloaded, and for the purpose of signaling the engineer of the train when the work should be accomplished, and while so engaged the plaintiff was, by the carelessness and negligence of such employees of the defendant engaged in unloading the car, struck by a long, heavy bale of hair felt, which was carelessly and negligently thrown out of the



*Medberry v. Chicago, etc., Ry. Co*

car by the co-employees of the plaintiff engaged in unloading the same; that the injury was occasioned solely by the careless and negligent manner in which the co-employees of the plaintiff handled and manipulated the heavy bale of material, and without fault or negligence upon the part of the plaintiff; that by reason of being struck as aforesaid the plaintiff was then and there seriously injured, and became sick and disabled, and that such injury had been progressive, and had rendered him permanently disabled. As indicated, the complaint expressly alleges that the plaintiff was injured solely by being struck by "a long, heavy bale of hair felt" carelessly and negligently thrown by the defendant's employees, who were co-employees of the plaintiff, engaged in unloading a freight car containing such bales. It is well settled that, in the absence of a statute giving the right, there can be no recovery from the master by reason of the sole negligence of such co-employee. *Moseley v. Chamberlain*, 18 Wis. 700, 705, 706; *Cooper v. Railway Co.*, 23 Wis. 668; *Anderson v. Railway Co.*, 37 Wis. 321; *Brabbits v. Railway Co.*, 38 Wis. 289. The only statute which is claimed to give any such right of action to the plaintiff in the case at bar declares that: "While any such employee is so engaged in operating, running, riding upon, or switching passengers, freight, or other trains, engines, or cars, and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer, or agent of such company in the discharge of, or for failure to discharge his duties as such." Subdivision 2, § 1816, Rev. St. As the complaint alleges that the plaintiff was free from contributory negligence, he is entitled to recover if the facts alleged bring the case within the provisions of the statute quoted. That statute has been in force since April 22, 1893, and has repeatedly been before this court for construction. In *Smith v. Railway Co.*, 91 Wis. 503, 65 N. W. 183, it was held, in effect, that a car repairer and a yard switchman were fellow servants, and that the statute did not apply to an

Medberry v. Chicago, etc., Ry. Co

injury sustained by a car repairer through the negligence of such yard switchman in causing a car to be kicked against the stationary car in which such repairer was at work. In that case MR. JUSTICE MARSHALL, speaking for the whole court, said that: "The words, 'while engaged in the performance of his duties as such employee,' refer to the words, 'while operating, running, riding upon, or switching passenger or freight or other trains, engines, or cars.' This, we think, is very clear. It is a familiar principle that statutes in derogation of the common law should be strictly construed, and not given any effect beyond the plain legislative intent. \* \* \* The legislative idea of that part of the law under consideration plainly is to give a right of action to the class of employees engaged in operating and moving trains, engines, and cars while actually so engaged; and the words used to express such idea are too plain to leave any room for a resort to the rules for judicial construction to determine their meaning." Page 506, 91 Wis., and page 183, 65 N. W. In *Ean v. Railway Co.*, 95 Wis. 69, 69 N. W. 997, it was held that "a freight handler, while actually engaged in moving a freight car along the track to the freight house in the course of his employment, was engaged in operating and moving the car, within the meaning of" the statute quoted. In that case *Smith v. Railway Co.* was expressly sanctioned, and some of the language quoted above repeated. In *Hibbard v. Railroad Co.*, 96 Wis. 443, 71 N. W. 807, it was held that "a warehouseman of a railroad company, who was injured, while sealing the doors of a car attached to an engine, through the negligence of an engineer or fireman in suddenly moving the engine, was not employed in 'operating, running, riding upon, or switching' trains or cars, within the meaning of" the statute quoted. In that case MR. JUSTICE WINSLOW, speaking for the whole court, said: "That the plaintiff was not at the time of his injury engaged in 'operating, running, or riding upon, or switching' a car is so plain that argument of the question is unnec-

Medberry v. Chicago, etc., Ry. Co

essary. Sealing the door of a car plainly is not operating or running it. This view is in harmony with the previous decisions of this court construing this statute." In the case at bar it became necessary to have the freight car containing the heavy bales of hair felt unloaded at the freight depot at the station in Elkhorn, in order that it could be taken as a part of the train to Eagle. For that purpose the plaintiff caused that car to be put into the train, and drawn up to such freight depot. After that car was unloaded, it would have been the duty of the plaintiff, had he not been injured, to see to it that the door of the car was properly closed and fastened, and to have signaled the the engineer of the train when the work should be completed. While the plaintiff was standing by the side of the car so being unloaded, watching an open switch easterly from the train, and waiting to so close the door of the car when it should be unloaded, he was struck by the long, heavy bale of hair felt, and injured. In our judgment, the plaintiff was not, at the time of his injury, engaged in "operating, running, riding upon, or switching" the train, engine, or car, within the meaning of the statute quoted, as construed by this court. It is unnecessary to consider what has been decided by other courts under different statutes. The order of the circuit court is affirmed.

DODGE, J. (dissenting). I find myself unable to concur in the decision reached by the court, which seems to me to very materially emasculate the statute (section 1816), and to thwart the purpose of the legislature in enacting the same. The ancient doctrine excusing the employer from liability for an injury to an employee occasioned by negligence of a co-employee grew up at a time when the employees of the same master were few in number, and closely connected in their employment, and when, therefore, the opportunity of the employee to know as to the characteristics for caution, intelligence, etc., of his co-employee, and to guard himself against

*Medberry v. Chicago, etc., Ry. Co*

any lapses therein, were much better than those of the employer. The extension of that doctrine to the greatly modified industrial relations of the present day has carried it far beyond the reasons which led to its original adoption, until in modern times it has been applied to men ordinarily having no contact with each other, no opportunity to observe each other; indeed, no knowledge of the existence or employment one of the other. This strain on the doctrine has perhaps been stronger in the case of railroad employees than any others. The conductor or the engineer residing at one end of 100 miles of railroad has no opportunity to know of the qualifications of the switch tenders, flagmen, track layers, section men, or station agents who may from time to time be scattered by his employer along that stretch of track. The stress of haste and expedition resting upon them precludes them from taking precautions against acts of negligence of these various other employees along the route, and almost, if not entirely, negatives the existence of the reasons which led to the adoption of the co-employee doctrine originally. Legislatures of many of the states have recognized the inapplicability of this doctrine to certain modern situations, and to those of railroad employees more than others. After several experiments in this and other states, section 1816, subd. 2, was adopted in 1898 as an attempt to legislatively define those whose duties were of such a character as to make the application of the co-employee doctrine improper. The statute, doubtless, was not perfect, and there may well be other instances as much entitled to legislative regard as those to which the statute is addressed; but to the extent to which it went it was positive, and left to the courts nothing of policy, but merely ascertainment of the facts. It created a class of employees whom it declared exempt from the application of this doctrine, and described that class as employees "engaged in operating, running, riding upon, or switching passenger, freight, or other trains, engines, or cars, while engaged in the performance of his duty as such employee." In the first case which arose—

*Medberry v. Chicago, etc., Ry. Co*

*Smith v. Railway Co.*, 91 Wis. 503, 506, 65 N. W. 183—this construction was declared, and the company was held not liable to an employee injured by reason of the running of engines and cars, because he was not in that class, he being a mere car repairer, engaged in making some repairs upon a car standing in the yard; he was not an "employee engaged in running or operating trains or cars." A similar holding was made in *Hibbard v. Railway Co.*, 96 Wis. 443, 71 N. W. 807, as to a yard employee who was sealing the door of a car standing on the track, although he, too, was injured by reason of the moving of an engine. These decisions were clearly in accord with the statute, for these men were not in the class of employees exempted by the legislature from the co-employee doctrine. Certain employees, however, must have been in the minds of the legislators as coming within the language of the statute, and most surely there must have been included the train crew, namely, the engineer, the fireman, the conductor, and the brakemen. These employees are, by the statute, exempted from peril from negligence of any others "while engaged in the performance of their duties as such employees." Can it be doubted that a brakeman is in the class so exempted because he may be repairing or fastening a door of a car while the train is in the course of its trip? Is he not then in the performance of his duty as such employee, to wit, as a brakeman? If not, what kind of an employee is he? Has he become a car repairer or a yard man? Shall a fireman, while in the midst of his run, although the engine be for a moment stationary, be held not engaged in the performance of his duty as such employee while oiling the engine, or tightening a nut upon it, because, forsooth, a machanic in the shop would not be within the statute if he were doing the same thing? It is a safe inference that this class was selected because its members are obliged to do many of the things which at times are done by other employees, under circumstances which subject them to greater peril. A part of the duty of the conductor and of the brakeman while operating their train is the giving of signals

*Medberry v. Chicago, etc., Ry. Co*

to the engineer and throwing of switches, to accomplish which the crossing of tracks and the exposure of themselves to perils thereby are absolutely necessary, and under such haste as to exclude them from the precautions that might be exercised by yard men in doing the same things. To my mind, a conductor does not cease to be such employee the moment his train stops, nor is he any the less operating it when standing on the platform to signal the engineer than when sitting in the caboose between stations. The situation presented by this case illustrates the propriety of our statute. The conductor's duty of expedition required his presence in such proximity to the car door that he might close it without delay, and his duty to care for his train by watching the open switch required a division of his attention, so that he could not exercise the precautions which might have been available to an employee of a different class, not burdened with the duty of operating the train. The Iowa statute has been so construed as to give right of recovery under circumstances here presented. *Akeson v. Railway Co.*, 11 Am. & Eng. R. Cas., N. S., 430, 75 N. W. 676. That statute, while differing from our own, resembles it in some respects, and was much considered in formulating ours. I think decisions upon it are worthy of consideration.

To summarize my views: I think a conductor is one of the class of employees engaged in operating trains, etc.; that while standing beside his train to close a car door and signal the engineer he is "engaged in the performance of his duties as such employee," to wit, as a conductor, and also that he is engaged in operating his train; and therefore may recover for injuries caused by negligence of a co-employee. The rule of strict construction invoked by my Brethren does not justify the court in repudiating the clear intent of legislation. That seems to me the result of the decision in this case.

WINSLOW, J. I concur in the foregoing opinion by Mr. JUSTICE DODGE.

Narramore v. Cleveland, etc., Ry. Co

## NARRAMORE

v.

CLEVELAND, C , C. &amp; ST. L. RY. CO.

*(Circuit Court of Appeals, Sixth Circuit, July 5, 1899.)*

**Injury to Employees—Effect of Assumption of Risk in Action under Penal Statute.\***—The statute of Ohio for the protection of railroad employees, requiring a railroad, on penalty of a fine, to block its guard rails and frogs, changes the rule of the liability of the defendant in an action against the railroad by its brakeman for injuries sustained by plaintiff through having his foot caught in one of defendant's unblocked guard rails, and relieves plaintiff from the effect of the assumption of risk which might otherwise be implied against him; as assumption of risk is a term of the contract of employment, express or implied, and under the statute a right of action arises in favor of an injured railroad employee, in addition to the criminal liability expressly provided for, entirely independent of the contract of employment.

**ERROR** by plaintiff to the circuit court of the United States for the Western Division of the Southern District of Ohio. *Reversed.*

This writ is brought to review a judgment for the defendant in a suit to recover damages for personal injuries sustained by plaintiff while in defendant's employ as a yard switchman in its railroad yards at Cincinnati, Ohio. While plaintiff was attempting to couple two freight cars, his foot was caught in an unblocked guard rail, and in his effort to extricate the foot his right hand was crushed between the drawheads of the cars, and injured so badly as to require amputation. Plaintiff had been in defendant's employ seven months. About one-third of that time he was engaged during the daytime, and two-thirds during the night. He had had nine years' experience as a railroad man.

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\*See note at end of case.

Narramore v. Cleveland, etc., Ry. Co

A railroad man of experience can see at a glance whether a guard rail or switch is blocked or not. There were a great many guard rails and switches in the yards where plaintiff worked. With the exception of a few, where experimental blocks were used, the defendant did not use blocks in either its guard rails or switches. Plaintiff said he did not know that the guard rail in which his foot was caught was not blocked, and that he had not noticed whether the guard rails and switches of defendant generally were blocked or not. The plaintiff relied on the following statute of Ohio, passed March 23, 1888 (85 Ohio Laws, p. 105): "Every railroad corporation operating a railroad or part of a railroad in this state shall, before the first day of October, in the year one thousand eight hundred and eighty-eight, adjust, fill or block the frogs, switches, and guard-rails on its tracks, with the exception of guard-rails on bridges, so as to prevent the feet of its employees from being caught therein. The work shall be done to the satisfaction of a railroad commissioner. Any railroad corporation failing to comply with the provisions of this act, shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars." It appeared from the evidence that the defendant company was operating this railroad at the time of the passage of the act, and has operated it ever since. At the close of the evidence the trial court directed the jury to return a verdict for the defendant on the ground that defendant's failure to block its rails and switches was obvious, and the plaintiff must be held, notwithstanding the statute, to have assumed the risk of injury therefrom, and upon such verdict entered judgment for the defendant.

*C. M. Cist and Harlan Cleveland*, for appellant.

*Judson Harmon*, for appellee.

Before TAFT and LURTON, Circuit Judges, and THOMPSON, District Judge.

TAFT, Circuit Judge (after stating the facts as above). In the absence of the statute, and upon common-law principles,



*Narramore v. Cleveland, etc., Ry. Co*

we have no doubt that in this case the plaintiff would be held to have assumed the risk of the absence of blocks in the guard rails and switches of the defendant. His denial of knowledge of the fact that the particular guard rail causing the injury was unblocked is entirely immaterial. Nor is his vague statement that he was so busy as not to notice whether the rails and switches of plaintiff generally were unblocked in a yard where there were hundreds of guard rails and switches, and in which he was constantly at work for seven months, of more significance or weight. His evidence upon this point is not creditable to him. He could only have been ignorant of the admitted policy of the defendant in respect to blocks through the grossest failure of duty on his part in a matter that much concerned his personal safety and the proper operation of the road. In such a case the authorities leave no doubt that the servant assumes the risk of the absence of the blocks, and the employer cannot be charged with actionable negligence towards him. *Railway Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530; *Appel v. Railway Co.*, 111 N. Y. 550, 19 N. E. 93; *Railway Co. v. Risdon's Adm'r*, 87 Va. 335, 339, 12 S. E. 786; *Wood v. Locke*, 147 Mass. 604, 18 N. E. 578; *Railway Co. v. McCormick*, 74 Ind. 440; *Railway Co. v. Ray* (Ind. Sup.), 51 N. E. 920; *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582; *Mayes v. Railway Co.*, 63 Iowa 562, 8 Am. & Eng. R. Cas. 527; 14 N. W. 340, and 19 N. W. 680; *Wilson v. Railroad Co.*, 37 Minn. 326, 31 Am. & Eng. R. Cas. 244, 33 N. W. 903; *Railway Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044; *Railway Co. v. Davis*, 54 Ark. 389, 15 S. W. 895.

The sole question in the case is whether the statute requiring defendant railway, on penalty of a fine, to block its guard rails and frogs, changes the rule of liability of the defendant, and relieves the plaintiff from the effect of the assumption of risk which would otherwise be implied against him. We have already had occasion to consider in a more or less direct way the effect of the statute. *Railway Co. v. Van Horne*, 16 C. C. A. 182, 69 Fed. 139; *Railway Co. v.*

Narramore v. Cleveland, etc., Ry. Co

Craig, 19 C. C. A. 631, 73 Fed. 642. In these cases we held that the failure on the part of a railway company to comply with the statute was negligence *per se*. A further consideration of the statute confirms our view. The intention of the legislature of Ohio was to protect the employees of railways from injury from a very frequent source of danger by compelling the railway companies to adopt a well-known safety device. It was passed in pursuance of the police power of the state, and it expressly provided, as one mode of enforcing it, for a criminal prosecution of the delinquent companies. The expression of one mode of enforcing it did not exclude the operation of another, and in many respects more efficacious, means of compelling compliance with its terms, to wit, the right of civil action against a delinquent railway company by one of the class sought to be protected by the statute for injury caused by a failure to comply with its requirements. Unless it is to be inferred from the whole purview of the act that it was the legislative intention that the only remedy for breach of the statutory duty imposed should be the proceeding by fine, it follows that upon proof of a breach of that duty by the railway company, and injury thereby occasioned to the employee, a cause of action is established. *Groves v. Lord Wimborne* [1898] 2 Q. B. 402, 407; *Atkinson v. Waterworks Co.*, 2 Exch. Div. 441; *Gorris v. Scott*, L. R. 9 Exch. 125. In this case there can be no doubt that the act was passed to secure protection and a newly-defined right to the employee. To confine the remedy to a criminal proceeding in which the fine to be imposed on conviction was not even payable to the injured employee or to one complaining, would make the law not much more than a dead letter. The case of *Groves v. Lord Wimborne* involved the construction of a statute quite like the one at bar, and a right of action was held to be given thereby to the injured servant in addition to the criminal prosecution. The courts of Ohio have given the statute under discussion the same construction. *Railroad Co. v. Lambright*, 5 Ohio Cir. Ct. R. 433, affirmed

Narramore v. Cleveland, etc., Ry. Co

by the supreme court of Ohio without opinion, 29 Wkly. Law Bul. 359.

Do a knowledge on the part of the employee that the company is violating the statute, and his continuance in the service thereafter without complaint, constitute such an assumption of the risk as to prevent recovery? The answer to this question is to be found in a consideration of the principles upon which the doctrine of the assumption of risk rests. If one employs his servant to mend and strengthen a defective staircase in a church steeple, and in the course of the employment part of the staircase gives way, and the servant is injured or killed, it would hardly be claimed that the master was wanting in care towards the servant in not having the staircase which fell in a safe condition. Why not? Because, even if no express communication is had upon the subject, the servant must know, and the master must intend, that the dangers necessarily incident to the employment are to be at the risk of the servant, who may be presumed to receive greater compensation for the work on account of the risk. The foregoing is an extreme case, perhaps, but it fairly illustrates the principle of assumption of risk in the relation of master and servant. Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk, and is well supported by the judgments of LORD JUSTICES

Narramore v. Cleveland, etc., Ry. Co

BOWEN and FRY in the case of *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 695. See, also, language of LORD WATSON in *Smith v. Baker* (1891) App. Cas. 325 and *O'Maley v. Gaslight Co.*, 168 Mass. 135, 32 N. E. 1119. It makes logical that most frequent exception to the application of doctrine by which the employee who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it. *Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978; *Snow v. Railway Co.*, 8 Allen 441; *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140. From the notice and the promise is properly implied the agreement by the master that he will assume the risk of injury pending the making of the repair.

If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize as against a servant an agreement express or implied on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant "to contract the master out" of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that. The cases upon the subject are by no means satis-

*Narramore v. Cleveland, etc., Ry. Co*

factory, and, strange as it may seem, but few are in point. There is one English case which entirely supports our conclusion, and several dicta by English judges of like tenor. Several American cases on their facts also sustain the principle, though it must be confessed they do not very clearly state the true ground of their conclusion. There is one American case which is directly to the contrary, and possibly one other ought so to be regarded. There are several American cases that are said to be opposed to our view, but an examination of the facts in each will clearly distinguish them from the case at bar.

In the case of *Baddeley v. Granville*, 19 Q. B. Div. 423, the action was for the wrongful death of a miner, due to his employer's violation of a statute, and the defense of assumption of risk was set up. Section 52 of the coal mines regulation act of 1872 required a banksman to be constantly present while the men were going up or down the shaft, but it was the regular practice of the defendant, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed, in coming out of the mine at night, by an accident arising through the absence of a banksman. It was held that the plaintiff's intestate did not, by continued service after he knew of the violation of the statute, thereby assume the risk of danger therefrom. The court say (page 426):

"An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation, people may come to what agreements they like, but as to future breaches of it there ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. If the supposed agreement come to this: that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him for the benefit of

Narramore v. Cleveland, etc., Ry. Co

others as well as of himself, such an agreement would be in violation of public policy, and ought not to be listened to."

The judges deciding the case of *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 696, 703, had affirmed the view that assumption of risk did not apply to the neglect of a specific statutory duty imposed for the benefit of a class, but it was not the case before them. They said that the case of *Clarke v. Holmes*, 7 Hurl. & N. 937, 6 Hurl. & N. 349, proceeded on this ground, though it is difficult to find the ground stated in the opinions. *Durant v. Mining Co.*, 97 Mo. 62, 10 S. W. 484; *Grand v. Railroad Co.*, 83 Mich. 564, 47 N. W. 837; *Coal Co. v. Taylor*, 81 Ill. 590; and *Boyd v. Coal Co. (Ind. App.)*, 50 N. E. 368,—were all cases where assumption of risk would have been a complete defense if applicable in case of a failure by the master to discharge a statutory duty to the servant, and the latter's express or implied acquiescence therein; and yet the servant was given judgment. The reasons stated in some of these cases for the conclusion are not entirely satisfactory, and in the cases from Illinois and Indiana no distinction is made between the doctrine of assumption of risk and of contributory negligence, but they are all authorities on their facts for our conclusion. The case of *Knisley v. Pratt*, 148 N. Y. 382, 42 N. E. 986, however, presented the precise question for decision, and the court of appeals held expressly that a servant, by continuing in the employment of a master who is violating a statute passed to protect the servant, does assume the risk of danger from such violation, and cannot make it the ground of recovery. This is followed by the circuit court of appeals for the Second circuit in a New York case. *Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 79 Fed. 900. The court of appeals of New York, in *Huda v. Glucose Co.*, 154 N. Y. 474, 482, 48 N. E. 897, does not treat the question decided in the *Knisley Case* as controlling the case of servants acquiescing in and assuming the risk of a violation of a fire-escape statute by their master, and the court declined to decide it. The decision in the *Knisley Case* is largely based on the

Narramore *v.* Cleveland, etc., Ry. Co

the decision of *O'Maley v. Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, and *Goodridge v. Washington Mills Co.*, 160 Mass. 234, 35 N. E. 484. We think the learned court of appeals of New York failed to observe that the *O'Maley* and *Goodridge* Cases were not suits under a statute defining and enjoining a specific duty of a master for the protection of servants, but were suits under an employer's liability act, which relieved the servant from the burden of certain defenses by the master in suits for injury sustained by him while in his master's employ, but did not attempt to change the master's duty to the servant, or to change the standard of negligence between them as that was fixed at common law. Hence it was held by the supreme judicial court of Massachusetts that the doctrine of assumption of risk applied to suits under the statute as at common law, and *Thomas v. Quartermaine*, 18 Q. B. Div. 685, which was also a suit under an employer's liability act, was much relied on. And yet in *Thomas v. Quartermaine*, as we have seen, the two lord justices, forming the majority deciding the case, expressly pointed out that in a suit under a statute positively fixing a standard of duty the doctrine of assumption of risk could not be applied. The distinction between the employer's liability act and acts for the protection of servants in the nature of police legislation, like the act under consideration, is clearly shown in *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, where, though the court held that a servant might "contract the employer out" of liability under the former act, it was said that this could not be done in respect of a liability arising under a statute like the one at bar, passed for the protection of servants. The *Knisley Case*, which, in our judgment, was wrongly decided, and many others in which a right conclusion was reached, seem to us to confuse an agreement to assume the risk of an employment, as it is known to be to the servant, and his contributory negligence. That, under certain circumstances, the one sometimes comes very near the other, and cannot easily be distinguished from the other, may be conceded; but in

*Narramore v. Cleveland, etc., Ry. Co*

most cases there is a broad line of distinction, and it is so in this case. For years employees worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or nonaction in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences. The distinction has been recognized by the supreme court of the United States. In *Railway Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, the court said:

"The second instruction was properly refused because it confused two propositions,—that relating to the risks assumed by an employee in entering a given service, and that relating to the amount of vigilance that should be exercised under given circumstances."

In *Hess v. Railroad Co.*, 58 Ohio St. 167, 169, 50 N. E. 355, JUDGE SHAUCK, speaking for the supreme court of Ohio, said:

"Acquiescence with knowledge is not synonymous with contributory negligence. One having full knowledge of defects in machinery with which he is employed may yet use the utmost care to avert the dangers which they threaten."

The distinction is exceedingly well brought out in *Railway Co. v. Baker*, 33 C. C. A. 468, 91 Fed. 224, by JUDGE WOODS, speaking for the circuit court of appeals for the Seventh circuit. There the action was for damages against a railroad company for injury sustained by reason of a breach of a federal statute requiring the company to furnish grab irons. The statute, out of abundant caution, expressly provides that the continued service of the employee with knowledge of the breach of statutory duty by the company should not be regarded as an assumption of the risk. The court held that this proviso did not prevent the company from success-



Narramore v. Cleveland, etc., Ry. Co

fully maintaining the defense of contributory negligence. Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it. Many authorities hold that contributory negligence is a defense to an action founded on a violation of statutory duty, and this undoubtedly is the proper view. Such is the case of *Krause v. Morgan*, 53 Ohio St. 26, 40 N. E. 886, where the employee, in spite of a warning from his superior, and in the face of the most palpable danger, exposed himself to certain injury, and then sought to hold his employer liable because he had not employed the statutory methods of protecting him from the danger. In *Railway Co v. Craig*, 19 C. C. A. 631, 73 Fed. 642, we held that the *Krause* Case was one of contributory negligence, and followed it as such. The syllabus confuses the difference between assumption of risk and contributory negligence, but the syllabus and opinion are, of course, to be restrained to the facts. The following cases, relied on by counsel for the railway company, were also cases of contributory negligence in suits for violation of specific statutory duty: *Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725; *Coal Co. v. Muir*, 20 Colo. 320, 38 Pac. 378; *Holum v. Railway Co.*, 80 Wis. 299, 50 N. W. 99; *Grand v. Railroad Co.*, 83 Mich. 564, 47 N. W. 837; and *Taylor v. Manufacturing Co.*, 143 Mass. 470, 10 N. E. 308. In the last two cases the distinction

Carrier v. Union Pac. Ry. Co

between contributory negligence and assumption of risk is clearly referred to.

For the reasons given, we think the court below was in error in holding that the plaintiff assumed the risk of injury from the failure of the defendant to comply with the statute passed for his protection, and that the case should have been submitted to the jury on the issue whether, assuming the unblocked guard rails and frogs as a condition of the situation, he used due care to avoid injury therefrom. Judgment reversed, at costs of the defendant, with directions to order a new trial.

NOTE.

**Master and Servant—Assumption of Risk.**—In *Powell v. Ashland Iron Co.*, 98 Wis. 35, 73 N. W. 573, it was held that a servant entering and continuing in a master's employment after knowing that a duty enjoined on the master by a statutory provision is being violated assumes the risk of injury arising from such violation. See *Swift v. Fue*, 66 Ill. App. 651; *Chicago Pkg., etc., Co. v. Rohan*, 47 Ill. App. 640.

In *Simpson v. New York Rubber Co.*, 80 Hun 415, it was held that the servant did not waive non-compliance with such statutory provisions.

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CARRIER

v.

· UNION PAC. RY. CO.

(*Supreme Court of Kansas, Feb. 10, 1900.*)

**Going between Rails to Couple Cars—Contributory Negligence.**—A brakeman, engaged in coupling freight cars, went between the rails, a few feet in front of an approaching train, for the purpose of inserting a link in the drawhead of the nearest moving car when it should reach him. There were several inches of snow upon the ground. He slipped when walking upon the track, and, falling, his leg was run over and crushed. *Held*, that he was guilty of negligence contributing to his injury.

**Same—Customs.**—The court refused to receive testimony offered

## Carrier v. Union Pac. Ry. Co

by the plaintiff in rebuttal for the purpose of showing that the manner in which he was attempting to make the coupling at the time of the accident was a customary method known to the railway company. *Held* no error.

**Employee Choosing Dangerous Method.\***—If the plaintiff voluntarily and knowingly adopted an unsafe instead of a safe way of doing the work mentioned, and thereby received injuries, he cannot recover therefor.

**Instructions.**—A party cannot complain of an erroneous instruction given to the jury substantially in the language asked for by him. (Syllabus by the Court.)

**ERROR** by plaintiff from Saline county district court. *Affirmed.*

This was an action for personal injuries brought by the plaintiff in error against the railway company. Particular questions of fact were submitted to the jury. They returned answers to the same, together with a general verdict in favor of the defendant below. The facts of the case, found by the jury, are, in substance, as follows: The crew in charge of the train consisted of an engineer, fireman, conductor, and brakeman. Carrier was the brakeman. When the train, which was a south-bound one, reached Delphos, the rear part of it was left at the depot, while the locomotive, with some cars attached, went south of the depot for a considerable distance to do some switching. While the switching was going on, the conductor was at the depot, and Carrier attended to the coupling of cars, and to the giving of necessary signals for the movement of the locomotive. Some cars were standing on the main track, which had to be coupled to those attached to the locomotive. Carrier made the couplings. While doing this work he was upon the fireman's side of the engine. While the work was going on, the engineer occupied his post upon the right-hand side of the engine, where he attended to its operation. The fireman received the signals given by Carrier, and transmitted them to the engineer. After Carrier had coupled up the

\*See *Moore v. Kansas City, etc., Ry. Co. (Mo.)*, 12 Am. & Eng. R. Cas., N. S., 580, and *note*, 585 *et seq.*

*Carrier v. Union Pac. Ry. Co*

cars standing upon the main track, it was necessary for the cars attached to the locomotive to move northward from 600 to 900 feet before reaching the cars which had been left standing at the depot. There was no further coupling to be done until the cars attached to the locomotive had been backed down to those standing at the depot. After Carrier had coupled up the last of the two cars standing upon the main track, the train immediately began to back towards the cars standing at the depot, and Carrier started towards the north end of the moving train. The car he was compelled to walk past to get to the end of the train was 30 feet long, and, as the cars were moving at the same time, the distance he walked must have been considerably greater than 30 feet. The object which Carrier had in view in going to the end of the moving train was to insert a link in the drawhead of the last car, so that he would be ready to couple the two portions of the train together when the depot was reached. He went about 5 or 6 feet ahead of the moving train, and then started to step in between the rails for the purpose of inserting the link in the drawhead when the moving cars reached him. At that time the train was approaching him at the rate of about 4 miles per hour. There were several inches of snow upon the ground, which made it slippery, and more difficult and dangerous for Carrier to get around. As he stepped between the rails to insert the link in the drawhead of the approaching car, he slipped and fell, and had his leg run over and crushed. At the time he fell he was not in a position to be seen by either the engineer or the fireman, and the train was stopped just as soon as the engineer learned, from the motions and outcries of some boys near the track, that something unusual had happened. Among others, the court gave to the jury the following instructions: "(3) The burden of proof is upon the plaintiff, and, before he can recover in this action, you must find, from a preponderance of the evidence, that the plaintiff, in the performance of his duty as a brakeman for the defendant, exercised ordinary care upon his part,

## Carrier v. Union Pac. Ry. Co

and that said fireman and engineer, or one of them, was guilty of ordinary negligence at the time of the plaintiff's injury." "(10) If the jury believe from the evidence that there was a safe as well as an unsafe way for plaintiff to insert the link in the drawhead, and the jury believe from the evidence that plaintiff voluntarily and knowingly selected the unsafe way of doing it, and thereby received the injuries of which he complains, then I instruct you that plaintiff cannot recover damages against the defendant, even though you may also believe from the evidence that defendant and its employees were chargeable with negligence. (11) If the jury believe from the evidence that, in attempting to put the link in the drawhead, plaintiff voluntarily placed himself in a dangerous position, when he could have inserted the link in the drawhead without exposing himself to danger, and that he thereby contributed to the injury received by him, then I instruct you that plaintiff was chargeable with contributory negligence, and cannot recover damages against the defendant, even though you may find that the defendant and its employees were also chargeable with negligence."

*E. W. Blair and Garver & Larimer*, for plaintiff in error.

*A. L. Williams, N. H. Loomis, and R. W. Blair*, for defendant in error.

SMITH, J., (after stating the facts). Complaint is made that the trial court erred in refusing to permit the plaintiff below, in rebuttal of testimony introduced by the railway company, to show that the manner in which Carrier was working about the cars while in motion was a customary method among employees of the company, of which the latter had notice. Under the circumstances, the act of plaintiff in error in stepping between the rails in front of a moving car was manifestly negligent. He knew the surroundings. There were several inches of snow upon the ground. While the train was approaching slowly, it was so close upon him that a false step or a fall upon the slippery ground would almost certainly result

Same—Customs.

Carrier v. Union Pac. Ry. Co

in injury, perhaps death. Could the plaintiff below have avoided the effect of his own recklessness by proving that the way he attempted to do the work was customary, and that want of care was the rule among the employees of the road performing similar duties, and due caution the exception? We think not. His contributory negligence defeated his right of recovery. The question was whether he was responsible for his own injury. This responsibility could not depend upon whether other employees of the road, similarly situated, engaged in negligent practices, even with the knowledge of the company itself. The standard of due care required of a person engaged in the hazardous business of railroading cannot be lowered by the habitual negligence of others in the same line of work. The pertinent inquiry in such cases is whether the party himself was guilty of contributory negligence, and the degree of that negligence cannot be measured by comparing it with the negligent acts of others. In *Loranger v. Railway Co.*, 104 Mich. 80-86, 62 N. W. 137, 139, it is said: "Employees cannot bind a company by the performance of such reckless acts, no matter how frequently they may do them. It is abhorrent to reason and common sense to say that it is good and safe railroading, and careful conduct, for a brakeman to step in front of a train moving as fast as a fast walk, and perform service which requires him to step sideways to keep out of the way, knowing that death is almost sure to follow should he miss his footing. Testimony that such conduct is prudent and constitutes good railroading is incompetent and unworthy of credence." In the case of *Railway Co. v. Robbins*, 43 Kan. 145, 23 Pac. 113 (an action against a railroad company for wrongfully causing the death of a passenger conductor), the latter, in attempting to ascend a ladder at the side of freight car while the train was running at a rapid rate, fell therefrom and was killed. Testimony was offered to show how railroad men ought to and do ascend a ladder of a box car in such cases. The

Going between  
Rails to Couple  
Care—Contributory  
Negligence.

Carrier *v.* Union Pac. Ry. Co

court held such testimony to be incompetent; that to allow the practice of others to be proven would be to create a collateral issue as to the prudence of their conduct, and unnecessarily protract the trial; that the question before the jury was whether the deceased was guilty of such negligence as to preclude a recovery, and the practice or usage of others would not tend to prove care on his part. *George v. Railroad Co.*, 109 Ala. 245, 19 South. 784; *Larson v. Ring*, 43 Minn. 88, 44 N. W. 1078; *Mason v. Railway Co.*, 27 Kan. 83; 6 Am. & Eng. R. Cas. 1; *Railway Co. v. Clark*, 108 Ill. 113; *Railway Co. v. Evansich*, 61 Tex. 3. The case of *Railway Co. v. McCally*, 41 Kan. 639, 21 Pac. 574, is cited by counsel for plaintiff in error as justifying the admission of the testimony excluded. In that case an inquiry was permitted as to the usual custom of brakemen in a railroad yard, in the performance of their duties, riding upon the pilot of the engine. The fact was disputed as to whether such act was ordinarily safe. Here a dangerous position was voluntarily chosen by Carrier, and the fact of its being dangerous was obvious, and not affected by the surroundings. The cases of *Railroad Co. v. Kier*, 41 Kan. 661, 21 Pac. 770, and *Railway Co. v. French*, 56 Kan. 584, 44 Pac. 12, do not come up to the proposition contended for by the plaintiff in error.

It is insisted that the court erred in the third instruction set out in the statement, for the reason that the jury were told that, before the plaintiff could recover, they must find from a preponderance of the evidence that the plaintiff, in the performance of his duty as a brakeman, exercised ordinary care upon his part; thus shifting the burden of proof onto the plaintiff below to show a lack of contributory negligence. The error of this instruction, if not induced, was at least condoned, by the act of the plaintiff below, who requested that the court direct the jury as follows: "(3) The defendant railway company is responsible for all damages sustained by reason of the negligence of its employees. If you believe from the evidence

Instructions.

Carrier v. Union Pac. Ry. Co

that the plaintiff was in the exercise of ordinary care in the performance of his duty, and that he was injured because of the want of ordinary care on the part of the engineer or fireman, you should find for the plaintiff." There was an unnecessary allegation in the petition in the case to the effect that the injury to the plaintiff in error was caused without fault or negligence on his part, and the instruction asked followed the language of that pleading. The plaintiff in error is not in a position to complain of the action of the court.

It is further insisted that the court withdraw from the jury all consideration of the circumstances in which plaintiff below was placed at the time of the injury. Instruction No. 10 stated that if there was a safe as well as an unsafe way for plaintiff to insert the link in the drawhead, and the jury believed from the evidence that he voluntarily and knowingly selected the unsafe way of doing it, thereby receiving the injuries complained of, he could not recover. This instruction was in accordance with the rule laid down by this court in *Railway Co. v. Estes*, 37 Kan. 715, 16 Pac. 131, in which it is said: "If, in the discharge of a dangerous duty, an employee of a railroad company voluntarily places himself in a dangerous position unnecessarily, when there is another place that is safer, that he could have chosen, and he has time to exercise his judgment, and injury occurs to him by reason of his choice, he cannot recover for such injury." See, also, *Railroad Co. v. Tindall*, 57 Kan. 719, 48 Pac. 12. In 1 Bailey, Pers. Inj. § 1121, the rule is thus stated: "It is a familiar principle, which common sense as well as the rules of law ought to teach any one, that where an employee of a railroad knowingly selects a dangerous way, when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence." *Railroad Co. v. Orr*, 91 Ala. 548, 8 South. 360; *Railway Co. v. Holborn*, 84 Ala. 133, 4 South. 146; *Iron Co. v. Brennan*, 20 Ill. App. 555; *Railway Co. v. Davis*, 3 C. C. A. 420, 53 Fed. 61.

Employee Choosing Dangerous Method.



## Rutherford v. Southern Ry. Co

The jury found that there was no necessity for inserting the link in the drawhead at the time Carrier attempted to do so; that if he had waited until the moving cars had got within close proximity to the cars standing at the depot, and had then signaled the moving train to have stopped before inserting the link in the drawhead, and before making the coupling, he could have done the work without danger to himself. The jury also found that, in stepping between the rails to insert the link in the moving train, Carrier acted voluntarily, and furthermore that he could have inserted the link in the drawhead in a manner less dangerous than the way selected by him. Applying the rules of law to the facts thus found, it is quite clear that under the findings of the jury the defendant below was entitled to judgment. The judgment of the court below will be affirmed. All the justices concurring.

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## RUTHERFORD

v.

## SOUTHERN RY. CO.

*(Supreme Court of South Carolina, March 3, 1900.)*

**Instructions.**—The failure of the trial court to instruct on a certain point cannot be assigned as error, where there was no request for such an instruction.

**Injury to Employee—Negligence of Fellow Servant—Constitutional Provision.\***—A railroad employee, while engaged in loading rails on a car, was injured through the negligence of the "caller" of the gang in failing to countermand an order to throw a rail on the car. The "caller" was charged, with the duty of giving orders to plaintiff, as one of the gang, as to the handling of the rails until they were on the car. The evidence was conflicting as to whether the "caller" was appointed by the person having the general supervision of the work or by the other hands. *Held*, that there

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\*See *Bussey v. Charleston, etc., Ry. Co. (S. Car.)*, 11 Am. & Eng. R. Cas., N. S., 474, for the construction of the constitutional provision as to fellow-servants.

Rutherford v. Southern Ry. Co

might be a recovery against the railroad for the injury, although the "caller" and the injured employee were fellow servants; as the "caller" had the right "to direct the services" of the rest of the gang, within the meaning of the provision of the constitution of South Carolina conferring upon a railroad employee the right to recover for an injury sustained by him through the negligence of a fellow servant having the right to direct his services.

**Nonsuit.**—A motion for a nonsuit was properly refused; as there was some testimony tending to show negligence on the part of defendant.

**APPEAL** by defendant from Cherokee county common pleas circuit court. *Affirmed.*

The trial court's charge to the jury reads as follows: "This is a suit on the part of the plaintiff, Amos Rutherford, against the Southern Railway Company, for damages which it is alleged occurred to the plaintiff while he was serving the defendant railway company in the capacity of an employee; and it is alleged that the damages—that the injuries, rather—complained of were occasioned or caused through the negligent act of a co-employee or co-laborer. The defendant takes issue with him as to his damages, and sets up as an affirmative defense that, if he was injured, the injury was due to his own negligent act,—in other words, that he contributed to the injury himself; and for that reason the defendant contends it is not liable. Now, those are the issues upon which the parties have differed, and for the settlement of those issues you and I are here now to settle the difference. You will understand that the gist of the action is negligence on the part of the railroad company, or, in other words, on the part of a co-employee or servant of the railroad company; the plaintiff contending that by reason of that injury the company is liable to compensate him in damages for the injury received through the negligence of one of its servants, a co-employee with the plaintiff. Upon that the defendant denies the injury, and denies its liability, and sets up as an affirmative defense that, if he is injured, he contributed to that injury himself by his own carelessness and negligent act, and thereby the company is absolved

## Rutherford v. Southern Ry. Co

from any liability. Now, the law with reference to injuries was passed, or was enacted in the constitution of this state, in 1895. That constitution adopted the following as one of its provisions, which I will read to you: 'Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation or its employees as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars or one engaged about a different piece of work. Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways or appliances shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them.' Const. art. 9, § 15. Until the constitution was adopted, the liability of a corporation for the negligent act of its employees was on a different basis from this constitution. Formerly the party complaining of an injury caused by the negligent act of a co-laborer or employee working with him would have to show that the company was negligent in employing this co-laborer; but the constitution of our state modified or so changed the law as I have instructed you. So the law now is that, if one is so injured through the negligent act of a co-employee, the railroad company is liable for the consequences of such damage or injury, provided the party injured did not contribute to his own injury. Now, you will see that the charge of negligence is set out specifically in the complaint; that the work of loading rails was being done under the direction and supervision of the defendant's agents, Thomas Sumner and Lune Walker; that said agents carelessly and negligently gave an order to lift a certain rail, and throw it

*Rutherford v. Southern Ry. Co*

on board, without first seeing that this could be safely done, and carelessly and negligently revoked said order just as plaintiff and others were engaged in throwing said rail on the car, the result of which was that the end of the rail upon which plaintiff stood was thrown upon the car, while the other end was not so thrown, and the rail fell off the car upon the plaintiff, and bruised his body and limbs, and broke his leg. Now, you will see the gist of the action is negligence. The plaintiff charges that the company was negligent by reason of the fact that one of its servants gave a command to this plaintiff, and countermanded that order, and the order countermanding the command to throw the rail upon the car was too late for it to be obeyed; and by reason of that it is contended on the part of the plaintiff that the servant of the railroad company who gave the order was negligent, and through that negligent or careless act caused the injury to the plaintiff. Now, that is denied by the defendant. Then it becomes a question of evidence. Negligence is a question of fact for the jury. Under the constitution of this state our labors are divided. The law imposes upon the court the duty of charging juries with reference to any question of law that might arise in a case that is pertinent to the issue. Then it imposes upon them the duty of passing upon any facts in the case. Now, I charge you that the gist of this case is negligence. Now, it is for you to tell, under the facts of this case, whether it was through the negligence or careless act of the company. If so, I charge you it would be competent to compensate the plaintiff in whatever amount of damages you find he has suffered. If you find, on the contrary, that it was not through the negligent act of the company, or it was through the negligent act of the company, and he, by not obeying proper caution, contributed to the injury himself, why then, under those circumstances, he couldn't complain of the company. You have heard the facts detailed how the injury occurred. If it was through the negligent or careless act of the company or its servant that he was injured, and

## Rutherford v. Southern Ry. Co

the plaintiff didn't contribute to that injury through his carelessness himself, I charge you the company would be liable to compensate him for whatever damages he has sustained. On the contrary, if he contributed to the injury himself, the company would not be liable under those circumstances. If you come to the conclusion that the company was negligent, and he was injured through that negligence, and has not contributed to the injury himself, you will estimate the amount of damages; and in estimating the damages take into consideration the length of time he has lost, the actual injury he has received, and any pain or suffering he has undergone. You are at liberty to compensate him for that. The facts are for you. Was it through the negligent act of the company, or did he bring about the injury himself through his negligence or carelessness? Take the record and find a verdict. You cannot find a greater amount than they claim, —\$1,900; but you are to say what amount of damages he has sustained. You fix the amount irrespective of the amount claimed in the complaint. You cannot go beyond the amount claimed in the complaint, but you may find as much under it as your good judgment dictates. If you find for the plaintiff, say, 'We find for the plaintiff so many dollars,' writing out the amount, whatever you find. If you find for the defendant, say, 'We find for the defendant.' "

The following are defendant's exceptions: "(1) In ruling and holding that there was sufficient evidence of the negligence alleged to send the case to the jury. (2) In not granting the motion of defendant for a nonsuit. (3) In charging: 'That the defendant takes issue with him [the plaintiff] as to his damages, and sets up as an affirmative defense that, if he was injured, the injury was due to his own negligent act,—in other words, that he contributed to the injury himself; and for that reason the defendant contends it is not liable,'—the error being that by his charge his honor limited the defense to a denial of damages and to the defense of contributory negligence; whereas, by its answer the defendant denied that the plaintiff was injured, as well as

*Rutherford v. Southern Ry. Co*

that he had been damaged, and was also entitled to have the jury instructed that one of the issues raised by the pleadings was that plaintiff could not recover if he was injured by the negligent act of a co-employee or a fellow servant engaged in the same department of labor with the plaintiff. (4) In instructing the jury that under the constitution of 1895 'the law now is that, if one is so injured through the negligent act of a co-employee, the railroad company is liable for the consequences of such damage or injury, provided the party injured did not contribute to his own injury'; the error being that his honor limited the inquiry, and prevented them from inquiring—First, whether the injury complained of was caused by the act of one employed in the same department of labor as the plaintiff; second, if so, whether the act causing the injury was the act of a fellow servant. (5) Because his honor, in instructing the jury that the defense was limited to a denial of the injury or damages, and to the affirmative defense of contributory negligence on the part of the plaintiff, failed to instruct the jury on all of the issues raised by the pleadings, restricted the jury in their inquiries, and prevented them from determining whether the injury complained of was caused by the negligent act of a fellow servant engaged in the same department of labor with the plaintiff. (6) Because the constitution of 1895 does not take away from a defendant railroad company the right of showing as a defense that an injury was caused by a fellow servant engaged in the same department of labor, and his honor erred in not so instructing the jury. (7) Because his honor, by his charge, limited the defense—First, to a denial of the alleged negligence of a servant or agent of the defendant; second, to a denial of the alleged injury or damages; and, third, to the affirmative defense of contributory negligence on the part of the plaintiff,—whereas it is respectfully submitted the defendant was also entitled under its answer to show, as a matter of defense, that the plaintiff was injured by the act of a fellow servant engaged in the same department of labor with the plaintiff. (8) In charging in

## Rutherford v. Southern Ry. Co

reference to the alleged injury: 'If it was through the negligent or careless act of the company or its servant that he was injured, and the plaintiff didn't contribute to that injury himself, I charge you the company would be liable to compensate him for whatever damages he has sustained. On the contrary, if he contributed to the injury himself, the company would not be liable under these circumstances,'—the error being that his honor deprived the defendant of the defense that this alleged injury was occasioned by the act of a fellow servant engaged in the same department of labor with plaintiff, and not by any act of the defendant. (9) Because the charge of his honor as a whole was, as we respectfully submit, erroneous, in that it deprives the defendant of the defense that the alleged injury to plaintiff was caused by the act of a fellow servant engaged in the same department of labor, and was calculated to mislead the jury by causing them to think that a railroad company would be liable for an injury done to its servants by the negligent act of a fellow servant, even though such fellow servant was employed in the same department of labor with the one who was injured."

*Duncan & Sanders*, for appellant.

*J. C. Jefferies*, for respondent.

McIVER, C. J. This action was brought by the plaintiff to recover damages for certain injuries received by plaintiff, while in the employment of the defendant company, through the alleged negligence of the agents and servants of said company. The defendant, in its answer, sets up two defenses: (1) A general denial of all the allegations of the complaint, except as to the corporate capacity of the defendant company; (2) contributory negligence on the part of the plaintiff. The case came on for trial before his honor, JUDGE ERNEST GARY, and a jury, and at the close of the testimony on the part of the plaintiff a motion for a nonsuit was made on the ground that there was no testimony tending to show negligence. The motion was overruled, the circuit judge holding that there was evidence sufficient to

Rutherford v. Southern Ry. Co

carry the case to the jury. The defendant then introduced its testimony, and the case went to the jury under the charge of the circuit judge, which is set out in the "case," and, the jury having found a verdict in favor of the plaintiff, and judgment having been entered thereon, the defendant appeals upon the several exceptions set out in the record. The charge of the circuit judge, as well as appellant's exceptions, should be incorporated by the reporter in his report of this case. It will be observed that all of these exceptions except the first two impute error to the circuit judge in failing to instruct the jury that, notwithstanding the change in the law, effected by the provisions of section 15, art. 9, of the present constitution, with respect to the right of an employee to recover from a railroad company damages for injuries sustained by reason of the negligence of a fellow servant, yet a railroad company could still, by way of defense, show that the fellow servant whose negligence caused the injury complained of was "engaged in the same department of labor with the plaintiff." In the first place, there was no request that the jury should be so instructed; but, in the second place, the conceded fact is that the injuries complained of were sustained by the plaintiff while engaged, along with some 16 or 18 other employees, in loading flat cars, while moving

Instructions.

slowly along the track, with iron or steel rails, and the testimony tended to show that the injury sustained by the plaintiff was caused by the failure of Lune Walker to countermand the order to throw the rail on the car in time for the plaintiff to escape from the falling rail. The undisputed fact is that the gang of hands engaged in loading the cars were under the control and supervision of Capt. Thomas Sumner, and that Lune Walker had been appointed "caller," as it is termed, whose duty it was to give the orders to the other hands when to take hold of the rail, when to raise the rail, and when to throw it on the passing car; and Capt. Sumner testifies that it was the duty of the other hands to obey the

Injury to  
Employee—Neg-  
ligence of Fellow  
Servant—Con-  
stitutional Pro-  
vision.



## Rutherford v. Southern Ry. Co

directions of the "caller." It is true that there was discrepancy in the testimony as to who appointed Walker as "caller,"—whether it was done by Sumner or by the other hands,—but we do not see what difference this would make. If appointed by Sumner, then it is clear that Walker was acting under the authority of the defendant company, as it is not disputed that Sumner had the general supervision of the work; and, if he was selected by the other hands, who voluntarily subjected themselves to his orders, Walker would still be a person "having a right to control or direct the services" of the plaintiff and the other hands with whom he was working, at least so far as the particular work in which he was engaged at the time the injury was sustained is concerned; for the provision of the constitution is that: "Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation or its employees as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work,"—because if Sumner, who unquestionably had the control and supervision of the hands engaged in loading the cars with the iron or steel rails, instead of appointing the "caller" himself, allowed the other hands to do so, then when Walker, the caller, gave the directions to the hands as to how and where the rails should be handled, such directions, in fact, proceeded from Sumner, through Walker, and, if the plaintiff's injuries resulted from the negligence of Walker in giving such directions, then, though Walker was a fellow servant of plaintiff, and engaged in the same department of labor, yet the defendant company was not entitled to the defense growing out of the fact that plaintiff and Walker were fellow servants,

## Rutherford v. Southern Ry. Co

because Walker was a person having the right "to direct the services" of the party injured. For this reason, also, there was no error on the part of the circuit judge in omitting to instruct the jury as it is claimed in exceptions 3, 4, 5, 6, 7, 8, and 9 he should have done, and therefore these exceptions must be overruled.

The first and second exceptions impute error to the circuit judge in refusing the motion for a nonsuit. We agree with the circuit judge that there was some testimony tending to show negligence on the part of the defendant company through its servants or agents, and hence there was no error in refusing the motion for a nonsuit. Indeed, these two exceptions seem, from the argument of counsel, to rest upon the theory, already disposed of, that the negligence, if any, was that of Walker, and, he being a fellow servant with plaintiff, engaged in the same department of labor, such negligence cannot be imputed to the defendant company, even under the provisions of the present constitution. This theory, as we have seen, is not well founded, and therefore these exceptions cannot be sustained. It seems to us that the true construction of the constitutional provision above referred to is this: While it does not entirely deprive a railroad company, in a case like the present, from availing itself of the previously well-recognized defense that the injury complained of was the result of the negligence of a fellow servant, for which the company is not responsible, yet it does confine such defense within narrower limits than had been previously recognized; for it will be observed that the provision in question sets out with the declaration that every employee of a railroad company shall have the same rights and remedies for any injury sustained by him from the acts or omissions of such company "or its employees," whether fellow servants or not, as are allowed to a person who is not an employee of such company; and, if the section had stopped at that point, then the effect, manifestly, would have been to entirely deprive a railroad company of the right to

Nonsuit.

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

set up as a defense to an action like this that the injury complained of resulted from negligence of a fellow servant of the plaintiff, for which the company was not responsible. But the section does not stop at the point indicated, and, on the contrary, goes on to show in what cases an employee shall have the same rights and remedies as a person not an employee, as follows: (1) Where the injury results from the negligence of a superior officer or agent; (2) where it results from the negligence of a person having a right to control or direct the services of the party injured; (3) when it results from the negligence of a fellow servant engaged in another department of labor, or on another train of cars, or one engaged in a different piece of work. So that, in all other cases not falling under either of the classes above indicated, the law upon the subject of the defense of fellow servant remains the same as it was before. The judgment of this court is that the judgment of the circuit court be affirmed.

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AMERICAN EXPRESS COMPANY

v.

MAYNARD, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, *ex rel.* MOORE *et al.*

(*Supreme Court of the United States, April 16, 1900.*)

Express Company—Revenue Stamps—Mandamus—Federal Jurisdiction.—A proceeding for a *mandamus* to compel an express company to receive packages and to issue therefor a receipt with a revenue stamp affixed and canceled, without increasing the transportation charges because of the cost of the stamp, is a "suit" within the meaning of that term as employed in § 709 of the U. S. Rev. Stat.

Same—Same—Same—Same.—In such a proceeding in a state court, the case as made by the pleadings, and which was decided, involved a right, privilege or immunity under the "war revenue act" of 1898, which was specially set up and claimed by the defendant express company, to contract with shippers for the payment of

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

the tax provided for by the act, or to increase its rate, within the limits of reasonableness, to the extent of such tax, and such right, privilege, or immunity was denied by the state court. *Held*, that such decision was reviewable by the supreme court of the United States.

"War Revenue Act" — Whether Express Company May Shift Burden of Tax.\*—An increase of rate by an express company which is otherwise just and reasonable does not become unlawful, under the "war revenue act of 1898," because such increase is made with the purpose of shifting the burden of the one-cent tax provided for in such act from the express company upon the shipper.

ERROR by defendant to the supreme court of the state of Michigan. *Reversed*.

Statement by MR. JUSTICE WHITE:

The Attorney General of the state of Michigan on the relation of George F. Moore and others commenced proceedings in the circuit court of Wayne county, Michigan, against the American Express Company. The company was described as "a joint-stock association organized and existing under the laws of the state of New York and having its principal business office located in the city of New York, in said state." It was averred that the company complied with the requirements of certain statutes of the state of Michigan, and had obtained the necessary certificate authorizing it to carry on an express business in that state, and in order to conduct such business had a large number of agents and offices in the state. The petition then alleged that on June the 13th, 1898, the Congress of the United States passed an act commonly designated as the "war revenue act," by which it was made the duty of express companies on receiving a package for carriage to issue a receipt for such package, and providing that the receipt thus issued should bear a one-cent stamp. After referring to the text of the act of Congress on the above subject, it was alleged that by the provisions of the law in question the primary and absolute duty was imposed upon express

\*See *Crawford v. Hubbell* (C. C.), 13 Am. & Eng. R. Cas., N. S., 92; *Att'y Gen. v. American Exp. Co.* (Mich.), 13 *Id.* 95.

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

companies to provide the receipt, and to affix and cancel the one-cent stamp as required by law. The following averments were then made:

"That by reason of a desire of the respondent (the express company) to avoid the payment of the stamp tax, so called, and to impose such obligation on the shipper, the respondent herein refuses to accept any goods for transportation unless such shipper attaches the stamp to the said bill of lading, manifest, or other evidence of receipt and forwarding for each shipment, or furnishes the money or means for that purpose to the said company, and that the said company thereby not only avoids its duty under said act of Congress to pay and bear its proportion of the revenues to meet war expenditures as provided by said act, but violates its duty as a common carrier to receive, accept, and deliver such goods, wares, and merchandise so offered and tendered to it for that purpose."

A number of instances were specified where it was averred the express company on the tender to it of packages for transportation as a common carrier had refused to receive the same and to issue receipts therefor "unless a stamp of the value of one cent was paid or provided" by the shipper. It was charged that the conduct of the express company was in violation of the obligations imposed upon it by the act of Congress in question, and constituted a refusal to perform its duty as a common carrier. The prayer was for a *mandamus* commanding the company to receive packages for transportation by express, and issue a receipt with stamp duly canceled thereon, without seeking to compel shippers who might tender packages for carriage either to pay for the one-cent stamp or to provide the means for so doing.

The answer of the express company admitted that it required persons who tendered packages for carriage, by express, either to pay or provide the means for defraying the cost of the one-cent stamp, but denied that its conduct in so doing was a violation of the act of Congress by which the one-cent tax on express receipts was imposed. On the

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

contrary, it was averred that the act of Congress, when properly construed, although imposing the absolute duty to issue a receipt for every package as therein provided, left the question of who should pay for the stamp free for adjustment between the shipper and the express company. By the act of Congress, it was asserted, the express company had, therefore, the right or privilege of insisting that those who offered packages to be carried by express should either furnish the one-cent stamp or provide the means of paying for it. It was, moreover, alleged that the company had in effect but increased its rates on each shipment by adding to the previous rates the sum of the stamp tax. And it was averred that this increase the company was not forbidden to make, by the act of Congress imposing the one-cent stamp tax, and that the rate as increased by exacting that the one-cent stamp should be furnished or that its value be paid for by the shipper was just and reasonable, and was not in conflict with the act of Congress. The answer was in effect demurred to as not stating a defense. The case was submitted for decision on petition and answer. The court ordered the *mandamus* to issue substantially as prayed for. The cause was then removed by writ of *certiorari* to the supreme court of the state of Michigan, where the judgment of the trial court was affirmed. 118 Mich. 682, 77 N. W. 317. By an allowance of a writ of error the judgment of the supreme court of the state is before us for review.

*Messrs. Lewis Cass Ledyard and Wisner & Harvey*, for plaintiff in error.

*Mr. C. E. Warner*, for defendant in error.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court:

We will first dispose of the claim that this court is without jurisdiction to review the judgment, and that hence the writ of error should be dismissed. The contention is based upon the following: (1) That the proceeding below, being for a *mandamus*, was not a "suit" within the meaning of that

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

term as employed in § 709 of the Revised Statutes; and (2) because no Federal question is involved, and no such question was below decided.

The first proposition is not tenable. McPherson v. Blacker, 146 U. S. 1, 24, 36 L. Ed. 869, 873, 13 Sup. Ct. Rep. 3; Hartman v. Greenhow, 102 U. S. 672, 26 L. Ed. 271.

Express Com-  
pany—Revenue  
Stamps—Man-  
damus—Federal  
Jurisdiction.

The second is likewise without merit. From the summary of the pleadings just made, in the statement of the case, it is apparent that the issue between the parties involved an assertion on the one side that the act of Congress imposed on the express company the absolute duty of furnishing the receipt, of affixing the stamp thereto, and canceling the same. The argument was that it was hence a violation of the duty, imposed upon the express company by the act of Congress, for the company either to demand the stamp or the amount thereof from the shipper, and that it was also a violation of the act of Congress for the express company to increase its rates to the extent necessary to accomplish the result of securing the reimbursement of the amount of the one-cent stamp tax. On the other hand, the defense of the express company was that under the act of Congress it had the right, privilege, or immunity (which it specially set up and claimed) of demanding the payment of the one cent or of increasing its rates to the extent that the tax imposed a burden upon it, provided only the rates charged were just and reasonable. The question thus presented was in substance the only one decided by the supreme court of the state. In stating the issues arising for its decision, the court said: "The main question in the case relates to the construction to be placed upon the act in question," that is, the act of Congress. After a review of the provisions of the statute it was decided that under it the express company could not in any event or by any means transfer the burden of the tax in question. Considering the right of the express company to increase its

Same—Same—  
Same—Same.

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

rates to the extent necessary to secure the payment of the tax by the shipper, the court said:

"It is contended, however, that the company has the right to make new regulations and establish new rates to meet all this burden. It is contended that the effect of this is to throw the burden upon the shipper. It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax and thus cast upon the shipper the burden which the act of Congress puts upon the company. This is but an evasion and a subterfuge to avoid the terms of the act."

The foregoing reasoning was supplemented by comment upon the fact that the increase of rate resulting from the charge of one cent on each package was made without reference to the distance each package was to be carried. We do not, however, understand the remarks on this subject as implying that the court below decided that the rate as increased by the one cent was intrinsically unreasonable without regard to the provisions of the act of Congress, but only that the rate as so increased was unreasonable, because an attempt on the part of the express company to shift the burden of the tax imposed upon it by the act of Congress, and hence was by legal inference forbidden by that act. No other view is possible when the state of the record is considered. As we have seen, the controversy was submitted on petition and answer. It is nowhere, however, averred in the petition that the rates, with or without the addition of the tax, were intrinsically unjust and unreasonable; while in the answer, following an averment as to the enactment of the stamp act and its resulting effects, it was averred as follows:

"Respondent therefore decided to raise, and did raise, its rates of transportation to an amount reasonable and just, and only necessary to meet the change of conditions made by said act, and save itself from great loss of revenue and



American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

profits as compared with its earnings before the passage of said act.

"And respondent submits and asserts that it had the full and perfect right to make such change in its method of transacting its business and in its former rates for transportation."

As, therefore, upon the submission of the cause upon the pleadings, there was no controversy as to the intrinsic reasonableness of the increased rates, it follows that if we were to hold that the court below had decided that the increased rates were unreasonable in themselves, we would conclude that the court below had so held, although it was substantially admitted on the record by both parties that the increase of rates was just and reasonable, if not forbidden by the act of Congress. But such action cannot be attributed consistently with reason and justice. This being the state of the case, the Federal question presented is wholly unaffected by what was said by the court on the subject of the right of the corporation to increase its charges by the amount of the tax. As there was no allegation that the rates existing prior to the imposition of the one-cent stamp tax were unreasonable, it would follow that the rates which were otherwise reasonable were decided not to be so solely because there was added to the charge for each package the exact amount of the increased cost for transporting the package, occasioned as to each package, by the specific imposition on each by the act of Congress of the one-cent stamp tax. But to cause rates which were conceded to be reasonable to become unreasonable because alone of such increased charge the assumption must be made that the act of Congress not only imposed the burden of the tax solely on the express company, but also forbade its shifting the same by any and every method. And no other view is, in reason, possible when the averments of the answer are borne in mind. It hence results that the Federal question, although changed in form of statement, remains in substance the same. In the changed form it is as follows: Did the act of Congress deprive the express company of the right to shift

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

he burden of the tax by increasing the rate by the exact amount distinctly and separately imposed by the act upon each shipment, and hence render the charge unreasonable, which would be in itself reasonable, except for the hypothesis that the act of Congress renders all efforts to shift the tax illegal.

It follows that the case as made by the pleadings, and which was decided below, involved a right, privilege, or immunity under the act of Congress, which was specially set up and claimed by the express company, to contract with the shippers for the payment of the tax provided by the act of Congress, or to increase its rate, within the limit of reasonableness, to the extent of such tax, which right, privilege, or immunity was denied and held to be without merit by the court below. There is therefore jurisdiction. Rev. Stat. 709, chap. 11.

The controversy which is contained in the merits of the cause is resolvable into three questions: First. Does the act of Congress impose upon the express company the duty of making a receipt for a package tendered to it, and does it also forbid the express company from requiring the shipper to furnish the stamp to be affixed to the receipt, or of supplying the means of paying for the same? Second. If the act of Congress does impose such duty on the express company, and does inhibit it from requiring that the shipper furnish the stamp or the means of paying for it, does the act further forbid the express company from seeking to cast the burden on the shipper by an increase of rates? Third. And, as a corollary of the second proposition, does an increase of rate by an express company which is otherwise just and reasonable become unlawful, under the act of Congress, because such increase is made with the purpose of shifting the burden of the one-cent tax from its own shoulders to that of the shipper?

The first proposition is unnecessary to be considered, since, even although it be conceded that the act of Congress imposes on the express company the duty of paying the one-cent

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

stamp tax, this admission would not be at all decisive of the cause unless also it be ascertained under the second proposition, that the act of Congress also forbids the express company from shifting the burden of the tax by means of an increase of rates. And no necessity for passing on the first proposition arises from the mere fact that the decision of the second proposition requires a consideration of the provisions of the statute which it would be necessary to take into view if the first proposition was under consideration.

It is also to be observed that the second and third propositions, which involve, the one the right to shift the burden of the tax by exacting that the one cent be provided, and the other the power to increase rates within the limits of the requirement that the charges as increased be reasonable, both depend upon the same considerations.

Indeed, the question into which all the issues are ultimately resolvable is whether the right exists to shift the burden, of course ever circumscribed by the duty of not exceeding reasonable rates. If it does not, that is, upon the hypothesis that it not only can be, but is, forbidden, then it must result that all methods adopted to attain the prohibited result are void. On the contrary, if the right to seek to shift the burden obtains, then the substantial result of what is done becomes the criterion, and the mere fact that the motive, announced, for a reasonable increase of rates, is declared to be a shifting of the burden cannot prevent the exercise of the lawful right.

The special provisions of the law upon which the case turns are the first paragraph of § 6 and the express and freight clause of Schedule A, forming a part of § 25. 30 Stat. at L. 451, 459, chap. 448.

The paragraph of § 6 referred to is as follows:

"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other

"War Revenue  
Act"—Whether  
Express Com-  
pany May Shift  
Burden of Tax.

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

Now, there is nothing in the provisions just quoted which, by the widest conjecture, can be construed as expressly forbidding the person which the taxes are cast from shifting the same by contract or by any other lawful means. An inference to the contrary arises from the fact that the duty is imposed in the alternative on "any person or persons, or party, who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued."

The language of the express and freight clause of Schedule A is as follows:

"Express and Freight: It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

The argument is that as it is made the duty of the express company to make and issue "a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment, . . . and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifests, or other memorandum and to each duplicate thereof, a stamp of the value of one cent;" therefore, the obligation is imposed absolutely on the express company, not only to make and furnish the receipt, but to issue it with the stamp duly canceled. But as we have said, though the correctness of the claim be, *arguendo*, taken for granted, such concession does not suffice to dispose of the essential issues. They are that by the statute the express company is forbidden from shifting the burden by an increase of rates, although such increased rates be in themselves reasonable. As no express provisions sustaining the propositions are found in the law, they must rest solely upon the general assumption that because it is concluded that the law has cast upon the express company the duty of paying the one-cent stamp tax, there is hence to be implied a prohibition restraining the express company from shifting the burden by means of an increase of rates within the limits of what is reasonable. In other words, the contention comes to this, that the act in question is not alone a law levying taxes and providing the means for collecting them, but is moreover a statute determining that the burden must irrevocably continue to be upon the one on whom it is primarily placed. The result follows that all contracts or acts shifting the burden, and which would be otherwise valid, become void. To add by implication such a provision to a tax law would be contrary to its intent, and be in conflict with the general object which a law levying taxes is naturally presumed to effectuate. Indeed, it seems almost impossible to suppose that a purpose of such a character could

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

have been contemplated, as the widest conjecture would not be adequate to foreshadow the far-reaching consequences which would ensue from it. To declare upon what person or property all taxes must primarily fall is a usual purpose of a law levying taxes. To say when and how the ultimate burden of a tax shall be distributed among all the members of society would necessitate taking into view every possible contract which can be made, and would compel the weighing of the final influence of every conceivable dealing between man and man. A tax rests upon real estate. Can it be said that by the law imposing such a tax it was intended to prevent the owner of real property from taking into consideration the amount of a tax thereon, in determining the rent which is to be exacted by him? A tax is imposed upon stock in trade. Must it be held that the purpose of such a law is to regulate the price at which the goods shall be sold, and restrain the merchant therefore from distributing the sum of the tax in the price charged for his merchandise? As the means by which the burdens of taxes may be shifted are as multiform and as various as is the power to contract itself, it follows that the argument relied on if adopted would control almost every conceivable form of contract, and render them void if they had the result stated. Thus, the price of all property, the result of all production, the sum of all wages, would be controlled irrevocably by a law levying taxes, if such a law forbade a shifting of the burden of the tax and avoided all acts which brought about that result. It cannot be doubted that to adopt, by implication, the view pressed upon us, would be to virtually destroy all freedom of contract, and in its final analyses would deny the existence of all rights of property. And this becomes more especially demonstrable when the nature of a stamp tax is taken into consideration. A stamp duty is embraced within the purview of those taxes which are denominated indirect, and one of the natural characteristics of which is, although it may not be essential that they are susceptible of being shifted from the person upon whom in the first instance the duty of payment is laid.

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

We are thus invoked by construction to add to the statute a provision forbidding all attempts to shift the burden of the stamp tax when the nature of the indirect taxation which the statute creates suggests a contrary inference. And, in this connection, although we have already called attention to the consequences which must generally result from the application of the doctrine contended for, it will not be inappropriate to refer to certain of the provisions of the act now under consideration, which more aptly serve to make particularly manifest the consequences indicated. Thus, perfumery, patent medicines, and many other articles are required by the statute to be stamped by the owner before sale. The logical result of the doctrine referred to would be that the price of the articles so made amendable to a stamp tax could not be increased, so as to shift the cost of the stamp upon the consumer. Yet it is apparent that such a construction of the statute would be both unnatural and strained.

The argument is not strengthened by the contention that as the law has imposed the stamp tax on the carrier, public policy forbids that the carrier should be allowed to escape his share of the public burdens by shifting the tax to others who are presumed to have discharged their due share of taxes. This argument of public policy if applied to a carrier would be equally applicable to all the other stamp taxes which the law imposes. Nor is the fact that the express company is a common carrier and engaged in a business in which the public has an interest, and which is subject to regulation, of importance in determining the correctness of the proposition relied upon. The mere fact that the stamp duty is imposed upon a common carrier does not divest such tax of one of its usual characteristics or justly imply that the carrier is in consequences of the law deprived of its lawful right to fix reasonable rates. Unquestionably a carrier is subject to the requirement of reasonable rates, but as we have seen, no question of the intrinsic unreasonableness of the rates charged arises on this record or is at issue in this cause. As previously pointed out, to decide, as a matter of

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

law, that rates are essentially unreasonable from the mere fact that their enforcement will operate to shift the burden of a stamp tax would be in effect but to hold that the act of Congress by the mere fact of imposing a stamp tax forbids all attempts to shift it, and consequently that the carrier is deprived by the law of the right to fix rates, even although the limit of reasonable rates be not transcended. This reduces the contention back to the unsound proposition which we have already examined and disposed of.

There is a special provision of the law which grants affirmatively the right to add the tax to the cost of an instrument, and hence it is urged this express authority in one case is pregnant with the denial of a right to do so in other cases. The clause in the statute referred to is found in a paragraph of Schedule A, whereby a stamp tax is imposed on "bill of exchange (inland), draft, certificate of deposit drawing interest or order for the payment of any sum of money. . . ."

The second and concluding sentence of the paragraph reads as follows :

"And from and after the first day of July, eighteen hundred and ninety-eight, the provisions of this paragraph shall apply as well to original domestic money orders issued by the government of the United States, and the price of such money orders shall be increased by a sum equal to the value of the stamps herein provided for."

Without the provision last quoted, authority would have been wanting to increase the cost of a government money order, by adding the sum of the tax imposed upon such order to the charge therefor, because the charge for a money order was fixed by law. This at once explains the necessity for conferring authority to add to the cost of the money order the amount of the stamp tax. Instead, therefore, of giving rise to the suggestion that the right to shift the burden of other stamp taxes was taken away in all cases where there was liberty and power to contract, the provision relied on is persuasive to the contrary. For, clearly, the express authority conferred to do that which the law otherwise forbade in



American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

consequence of the want of power in a government official, cannot with reason be held to imply a prohibition against doing that which was not forbidden by law. The argument, in effect, amounts to this and nothing more; that, because it was imperatively necessary to confer a power upon a government officer which, owing to statutory restriction, he otherwise would not have possessed, therefore the legal deduction must be drawn that freedom of contract as between those who had the right to contract was destroyed.

But it is asserted that the war revenue act of 1898 was modeled upon the act of July the 1st, 1862, providing internal revenue tax (12 Stat. at L. 432, chap. 119), and as the act of 1862 plainly manifested the purpose of Congress to impose a stamp tax on express companies and to forbid them from shifting the burden arising from such tax, therefore the act under consideration should be construed as having the same effect. The fact that the present act was modeled upon the act of 1862 is undoubted (see § 94 of the act of 1862, 12 Stat. at L. 475, chap. 119), but the text of the act of 1862 expressed no restraint upon the power of shifting by contract or by an increase of rates within the limit of the requirement that they should be reasonable. It follows that testing the present act by that of 1862 throws no additional light upon the controversy. The claim that the act of 1862 contained a prohibition against shifting is thus inferred. By the act of 1862 a stated per centum of tax was imposed upon the gross receipts of railroads, steamboats, and ferryboats, as well as toll bridges. Section 80, 12 Stat. at L. 468, chap. 119. After providing for the levy and collection of the taxes in question, the following proviso was applied to the section by which the taxes just referred to were levied: "*Provided, That all such persons, companies, and corporations shall have the right to add the duty or tax imposed hereby to their rates of fare whenever their liability thereto may commence, any limitations which may exist by law or by agreement with any*

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

person or company which may have paid or be liable to pay such fare to the contrary notwithstanding."

This express authority to shift the burden of the tax on gross receipts, it is claimed under the rule of *inclusio unius*, justifies the implication that the power to shift did not exist as to taxes imposed by other portions of the act of 1862, to which the proviso did not apply.

In passing it is worthy of remark that by the act of March 3, 1863 (12 Stat. at L. 713, chap. 74), it was enacted (§ 10) that on and after the 1st day of April, 1863, "any person or persons, firms, companies, or corporations, carrying on an express business shall, in lieu of the tax and stamp duties imposed by existing laws, be subject to pay a duty of two per centum on the gross amount of all the receipts of such express business, and shall be subject to the same provisions, rules, and penalties as are prescribed in § 80 of the act to which this is an amendment." In other words, when in 1863 the stamp tax relating to express companies was abrogated and a tax on gross receipts substituted therefor, the express companies were authorized to add the result of the gross receipt tax to their charges, any law or contract to the contrary. But the implication deduced from the authority conferred by the statute of 1862 to shift the burden of the tax on gross receipts levied on railroads, etc., by an increase of charges, is unsound. Indeed, the proviso in question, when properly construed, gives rise to an inference contrary to the one sought to be drawn from it.

The tax imposed under the section in question was not in form a stamp tax, but on gross receipts, and the proviso referred to may, from abundance of caution, have been inserted to leave no room for the assumption that a tax thereby imposed was a direct tax, and not subject to be shifted. Besides, the whole context manifests the purpose not to declare a rule in violation of public policy as to particular corporations, but to enable such corporations to possess the power to shift the tax by increasing its charges, even although

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

contracts or restrictions previously imposed might otherwise prevent.

The right to shift by an increase of rates within what is reasonable can only be held to be illegal upon the assumption that public policy forbids it. If such be taken to have been the principle of public policy embodied in the act of 1862, that act must be held to have repudiated, by the proviso to § 80, the very public policy by the light of which it is contended the act must be interpreted. If there was a rule of public policy giving rise to the assumption that stamp taxes relating to express companies could not be shifted, it becomes impossible in reason to understand why, when the taxation was changed by the act of 1863 from a stamp tax to one on gross receipts, the express companies should have been brought within the proviso to § 80 of the act of 1862. Clearly, if the rule of public policy which is relied on existed it would have been as cogently applicable to the one form of tax as to the other.

In the State Freight Tax Case, 15 Wall. 232, 21 L. Ed. 146, the court was called upon to notice a state law conferring a right to charge over by an increase of rates the sum of tax imposed. In considering the subject (pp. 273, 274, 21 L. R. A. 161), it was said:

"The provision is as follows: 'Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith.' Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed

American Exp. Co. v. Maynard, Att'y Gen., *ex rel.* Moore

to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority."

Other contentions as to the construction of the act based upon various other provisions have been pressed with great earnestness, but we deem it unnecessary to consider them, as the foregoing considerations dispose of the case. It follows that the court below erred in holding that by the act of Congress the express company was forbidden from shifting the burden of the stamp tax by an increase of rates which were not in themselves unreasonable. *The judgment* below rendered *must, therefore, be reversed*, and the case be remanded for further proceedings not inconsistent with this opinion, and it is so ordered.

MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA dissenting:

We are of opinion that the act of Congress imposed upon the express company the duty, not only of affixing at its own expense the required stamp upon any receipt issued by it to a shipper, but of canceling such stamp—thus giving to the shipper a receipt that could, when necessary, be used as evidence. Whether the company, having issued a receipt duly stamped and canceled, could increase its charges against the shipper for the purpose, whether avowed or not, of meeting this additional expense, is not, in our opinion, a Federal question, and upon that point this court need not express an opinion.

Central Trust Co. of New York *v.* Chattanooga etc., R. Co

CENTRAL TRUST CO. OF NEW YORK  
*v.*  
CHATTANOOGA, R. & C. R. Co. *et al.*  
OWEN *et al.*  
*v.*  
JONES.

(*Circuit Court of Appeals, Fifth Circuit, May 16, 1899.*)

**Power to Mortgage After-Acquired Property—Charter and General Law.\***—A railroad corporation, organized under the general law of Georgia authorizing railroads to mortgage future-acquired property, may execute such a mortgage, although it is not authorized to do so by its charter.

**Mortgages—Insufficient Corpus—Income after Default—State Laws and Decisions.**—Under the laws of Georgia, as construed by the supreme court of the state, a mortgagee is not precluded from having the balance of his claim paid from the income accruing after default, where the corpus proves insufficient.

**Same—Same—Same—Appointment of Receiver.\***—Where the mortgagor is insolvent, and the sufficiency of the corpus is doubtful, the mortgagee may have a receiver appointed to preserve not only the corpus but the rents and profits for the satisfaction of the mortgage debt, although the mortgage does not cover the income.

**Railroads—Insolvency.**—When a railroad corporation is unable to pay its currently accruing interest, it is actually, as well as technically, insolvent, and its property inadequate security for its mortgage debt.

**Railroads—Receiverships—Income—Priority.**—Where a railroad mortgage expressly provides that the mortgagor shall receive the income until default has been made for three months in the payment of interest, and that then the trustee may take possession and operate the property until the sale, or apply for the appointment of a receiver to operate the property until sold, the lien of the mortgage is superior to the lien of subsequent judgments of the mortgagor's creditors, not only as to the proceeds of the corpus, but as to the net income from the operation of the road by a receiver appointed at the instance of the trustee.

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\*See notes at end of case.

Central Trust Co. of New York *v.* Chattanooga etc., R. Co

APPEAL by judgment creditors from the circuit court of the United States for the Northern District of Georgia.  
*Affirmed.*

*L. A. Dean* and *C. P. Goree*, for appellants.

*Alex. C. King*, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The Chattanooga, Rome & Columbus Railroad Company, by a different name, was chartered by an act of the legislature of the state of Georgia approved August 30, 1881. The company was given power to issue bonds in such amount as it desired, and to mortgage all of its railroad, right of way, rolling stock, and franchise for the purpose of securing its bonds. Laws Ga. 1880-81, p. 246, § 13. By an amendment approved December 22, 1886, it was provided that the company should have power and authority to issue income bonds, and to secure the same by a mortgage of its property and franchise, or by pledging the income of its railroad, either or both, as the company should deem proper. Laws 1886, p. 137, § 2. The company was authorized to construct a railroad from Chattanooga, Tenn., to Carrollton, Ga.,—a distance, by the route proposed, of about 140 miles. It began the construction of its road, placed a mortgage on that part of its property lying between Rome and Cedartown to secure an issue of bonds amounting to \$150,000, but up to September 1, 1887, had only completed 20 miles of its railroad. On September 1, 1887, it executed the deed of trust foreclosed in this proceeding. This deed conveyed to the trustee all of the railroad constructed and to be constructed extending from Chattanooga, Tenn., to Carrollton, Ga., with all the rights of way, depot grounds, yards, terminal property and rights, and all such real and personal property as might be germane to and necessary for the construction, operation, and maintenance of its line of railroad, whether then owned and possessed by the mortgagor or thereafter to be acquired,—specifying exhaustively the materials necessary

Central Trust Co. of New York *v.* Chattanooga etc., R. Co

to be used in the construction, maintenance, and operation of the railroad, whether then owned and possessed by the mortgagor or thereafter to be acquired by it; also all the rights, powers, privileges, and franchises of, or belonging to, or thereafter to be acquired by, the mortgagor. This deed of trust was subject to the former mortgage as to so much of the property as that mortgage embraced. It was given to secure an issue of bonds amounting in the aggregate to the sum of \$2,240,000. It provided that, in case of default for three months in the payment of any interest coupon when due, the principal of the bond to which the coupon was annexed should immediately become due; and if such default should be made in the payment of interest, and in the payment of principal thereby or otherwise matured, upon the written request of the holder of any bond or coupon the trustee was authorized, empowered, and directed to take and hold possession of the railroad and all its property, rights, etc., and to maintain and operate the same until the day of sale thereafter to be fixed, or, in its discretion, proceed by bill in equity or other appropriate proceeding in any court of competent jurisdiction, whether of the United States or of the state of Georgia, to foreclose the mortgage, and enforce the rights, liens, and securities of the trustee and bondholders thereunder. On September 2, 1887, the defendant railroad company (mortgagor) issued income bonds, and, to secure their payment according to their terms, executed and delivered to the same trustee a mortgage, covering the same property, declared to be subsequent and subordinate in all respects to the mortgage dated September 1, 1887, pledging as security for the payments stipulated to be made by the income bonds and coupons thereto attached the net earnings of the railroad, after providing for the interest on the \$2,240,000 of first mortgage prior lien bonds. After the execution and delivery of these mortgages, the mortgagor company sold and conveyed all of its property, including the property covered by the mortgages, to the Savannah & Western Railroad Company, which last-named company came under

Central Trust Co. of New York *v.* Chattanooga etc., R. Co

the control of the Central Railroad & Banking Company of Georgia, all of whose property was placed in the hands of receivers in March, 1892. On September 1, 1892, default was made in the payment of interest on the bonds secured by the mortgage of September 1, 1887, and on March 1, 1893, and on September 1, 1893, default was made in the payment of interest respectively maturing on those dates. On December 15, 1893, the trustee in the deed of trust exhibited its bill, with proper averments, asking for a foreclosure of its lien, a sale of the mortgaged property, and showing that the property was inadequate security for the debt, that the mortgagor and its assigns were insolvent, and praying that, pending foreclosure proceedings, the mortgaged property be taken possession of by a receiver to be appointed by the court, with such powers and authority as may be requisite to preserve the property until sale thereof, and to secure the earnings for the use of the bondholders. The appellee Eugene E. Jones was thereupon duly appointed receiver by an order passed February 1, 1894. He took possession of all of the railroad property, and operated it pending the progress of the foreclosure suit, under the customary orders in such cases. The decree of foreclosure and sale was passed July 12, 1894. It ascertained the amount due on the bonds at that date. It provided that the funds to be realized from the sale should be appropriated—First, to the payment of costs, including expenses and allowances indicated; second, to the payment of the principal and interest due and unpaid on the bonds secured by the mortgage of September 1, 1887; third, to the payment of the principal of the income bonds secured by the mortgage of date September 2, 1887; and, fourth, should there be any surplus remaining, after making the payments above directed, it was to be paid into the registry of the court to abide such order and decree as the court should make in respect thereto. For reasons which the record does not fully disclose, the sale was not made until some time in the early part of 1897. At the sale a reorganization committee



Central Trust Co. of New York v. Chattanooga etc., R. Co

In the opinion in the case just cited we find this language :

"If we have succeeded in showing that these railroad companies, supposing their special charters to be void, are *de facto* corporations, because of the existence of the general law, it would seem that they might make any contracts authorized by that law, and become bound by such contracts to those with whom the same were made. As a practical proposition, it is well known that most, if not all, of the railroads of any length in the United States which have been built for years past have been constructed by issuing in advance bonds upon their entire lines, including the unbuilt portions, as well as those already constructed, with mortgages to secure the bonds covering the whole. If a *de facto* railroad company is a corporation for any purpose at all, it ought, on general principles, to have the power to mortgage 'future-acquired property'; and this seems to be the doctrine very generally recognized by the courts."

On the authority of this decision of the supreme court of Georgia, the circuit court rightly held that the appellants' first contention is not well taken.

The appellants' second contention is that the deed of trust foreclosed in these proceedings does not purport, in express terms, to cover the income of the railroad property, and that,

Mortgages—  
Insufficient  
Corpus—Income  
after Default—  
State Laws and  
Decisions. if it did, the mortgagor company had no authority to mortgage its income. It is earnestly insisted that the questions submitted by

this contention depend upon the local law as declared by the statutes of Georgia and by the decisions of the supreme court of that state. We have examined with some care all the provisions of the statute law which seem to us to bear either directly or remotely upon these questions, and, in connection therewith, the decisions of the supreme court of Georgia to which we have been referred. We have considered with especial care and with deep interest the decision in *Green v. Railroad Co.*, 24 S. E. 814, and the later decision in *Railroad Co. v. Barton*, 28 S. E. 842.

Central Trust Co. of New York *v.* Chattanooga etc., R. Co

The authority of the decision first just above cited is stated thus by the court:

"By invoking equitable relief, such as the appointment of a receiver and the administration of the mortgaged property by equitable means and agencies, mortgagees submit themselves to do equity relatively to any creditor of the mortgagor who may rightly intervene in the foreclosure proceedings in which such relief is sought. Mortgages upon a railway, and the income from the same, the mortgagor being left in possession, are, as to the income, whether produced before or after the appointment of a receiver in foreclosure proceedings, subject to be postponed in equity in favor of a claim for damages resulting from a tort committed by the mortgagor while and by reason of operating the railway after the execution of the mortgage. The tort now in question consisting of negligence in running a train upon the railway, whereby damages accrued, and judgment therefor against the mortgagor having been obtained before the mortgages were foreclosed or the receiver was appointed, such damages, so reduced to judgment, should be regarded as operating expenses charged by the judgment upon income as against the mortgages and all their incidents. So long as such a charge is unsatisfied, the mortgagees cannot justly and equitably divert income from its payment, and take the benefit of such diversion, whether directly or indirectly."

This decision evidently does not purport to rest upon local law. It extends a little further than had hitherto been done the class of preferential claims which have been fully recognized generally by the court since the decision in *Fosdick v. Schall*, 99 U. S. 235. There was manifested in the circuit courts of the United States a disposition to extend the doctrine of *Fosdick v. Schall* to a degree that has challenged the attention of the supreme court, and moved it to check this tendency, as appears from its utterances in *Kneeland v. Loan Co.*, 10 Sup. Ct. 950, and subsequent cases. The fact that so many railroad corporations have issued bonds and mortgaged their property in advance of the construction

Central Trust Co. of New York v. Chattanooga etc., R. Co

of their railroads, and the acquisition of the property mortgaged, greatly beyond its market value at forced sale, had inclined courts of equity to treat the holders of railroad bonds, or the trustees in the mortgages, as the owners of the roads, rather than simply as lienholders, and to charge them as such owners, after default, with the unpaid expenses of operating the property. It has become the settled practice, where mortgagees invoke equitable relief and seek the appointment of a receiver and the administration of the mortgaged property by equitable means and agencies, to require them to permit payment of that large class of claims generally referred to as "preferential claims." The considerations which inspired the glowing argument of the distinguished jurist who wrote the opinion in the case of *Green v. Railroad Co.*, *supra*, have touched the consciences of other chancellors. No exactly definite limits can be traced to include the class of claims which have generally been heretofore allowed as preferential. The warnings of the supreme court indicate that the bounds have been extended as far as sound judicial discretion can go, and that, if further relief is needed, it can be granted only by the legislature. The decisions of the supreme court of Georgia on which the appellants chiefly rely have been rendered since the execution of the mortgage here involved, and since the default, which by the terms of the mortgage terminated the right of the mortgagor to receive the income, and since the appointment of the receiver, who took possession of the property at the prayer of the mortgagee, to secure the earnings of the railroad to the use of the bondholders. We do not see in these decisions anything to control or qualify the settled doctrine that has obtained in the courts of the United States in such foreclosure proceedings as these. The appellants appear to regard as of the first importance the distinction between mortgages which, in express terms and with full warrant, are made to include the income of the property, and those which for want of power in the mortgagor, or a failure to exercise the power, do not expressly embrace the income. As far as we

Central Trust Co. of New York v. Chattanooga etc., R. Co

have been able to discover, such a distinction cannot rest on any provisions of the statute law of Georgia that are peculiar to that state, either in the language of those provisions or in the construction that has been placed on the language by its supreme court. The Civil Code of Georgia (section 2723) declares, "A mortgage in this state is only security for a debt, and passes no title." That rule is not peculiar to Georgia. It was the rule in equity from the beginning. In this country that rule is accepted by the courts of law. In some states, as in Georgia, it is expressed in a statutory provision; but, wherever thus found, it is only declaratory of the law already established by the dealings of the people and the decisions of the courts. This rule being established, it would seem to be immaterial whether or not the income is expressly named as included in the mortgage. When the mortgage does expressly include the income, the mortgagee can only claim his debt, principal and interest; and, while these are paid as they mature, he can have no cause of action on his mortgage for possession, or for account of rents and profits, or for any other account. He receives what is due him as it matures, and the mortgagor, or his assigns in possession, receive, and have a right to receive, the rents and profits. If default is made in the payment of interest, or of principal that has matured, the mortgagee has his right to foreclose according to the terms of the mortgage. If the corpus of the mortgaged property is ample security for the whole mortgage debt, the mortgagee has no need, even after default, to look to the income, or to an account of rents and profits, so long as the corpus is adequate security. When the mortgaged property is not of value sufficient to secure the payment of the mortgage debt, or when its sufficiency becomes substantially doubtful, and the mortgagor is insolvent, accruing interest matured and unpaid, like accruing taxes due and unpaid, takes the character of waste as clearly and distinctively as deteriorations by the cutting of timber, suffering dilapidation, etc.,—the leading illustrations from the earliest time in the

Same—Same—  
Same—Appoint-  
ment of Receiver.

Central Trust Co. of New York *v.* Chattanooga etc., R. Co

adjudged cases and with text writers. In such cases courts of equity always have the power to take charge of the property by means of a receiver, and to preserve not only the corpus, but the rents and profits for the satisfaction of the debt. *Kountze v. Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911; *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420.

The bill in this case shows that the mortgagor company and its assigns are insolvent, are unable to pay their debts and liabilities in full, and that the value of the property covered by the mortgage of September 1, 1887, is less in amount than the amount of the bonds issued under that mortgage, and is inadequate security for their payment. The result of the sale shows that after nearly three years' delay (during which the property was improved) the court, through its commissioner, succeeded in obtaining a bid for the mortgaged property as an entirety to an amount equal to not more than one-fifth of the mortgage debt at the date of the sale. It is true that such sales are not a reasonable test of the actual value of such property. It is, however, equally true that the conditions which generally affect such property have been found to render it not practicable to make a sale thereof in any other manner to any greater or to an equal advantage to all parties concerned therein. The practical result from these prevalent conditions is that, when a railroad corporation is unable to pay its currently accruing interest, it is actually, as well as technically, insolvent, and its property inadequate security for its mortgage debt. The larger part of the value of the property is dependent upon its continued operation as a public carrier. Its successful operation and ability to earn income are in most cases largely dependent on the railroad's connections, and its friendly relations with other carriers, and on the good will it has secured. And while the appointment of a receiver is not a matter of strict right, and such applications always call for the exercise of judicial discretion, these imminent conditions bearing upon such property, after

Railroads—Insolvency.

Central Trust Co. of New York v. Chattanooga etc., R. Co

default by the mortgagor in the payment of interest on the mortgage debt, give to an application for the appointment of a receiver great force, and the practice to grant the prayer therefor in such cases has become settled. We think it is quite equally well settled that the receiver takes and operates the property, subject to the preferential claims as stated in *Fosdick v. Schall*, and to liens prior in point of time to the date of the mortgage, for the benefit of the mortgagees, according to their priority. His possession is "that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place." This is precisely what the circuit court did in this case. It has determined that the judgments, being junior to the mortgage in the date of their rendition, if entitled to a lien at all on the corpus of the mortgaged property, such lien is not superior to that of the mortgage. And the mortgage by its terms having limited the right of the mortgagor to remain in possession and receive rents and profits, and authorized the entry of the trustee either without or by the aid of a court of equity, the right to operate the road and receive its rents and profits, subject to such terms as the court of equity might impose, inured to the mortgagees at the date of the entry by the receiver.

We have seen that the mortgage does expressly provide that the mortgagor should receive the income until default had been made for three months in the payment of interest on the bonds, and that thereupon the trustee had the right to take possession and operate the mortgaged property until the sale to be there-  
after fixed, or, at its discretion, to apply to a court of equity, as it elected to do, for the appointment of a receiver to take charge of the property, and operate the same

Railroads—  
Receiverships—  
Income—  
Priority.

## Notes

until a sale should be made. We have seen, further, that in the issuance of its income bonds, and the mortgage given to secure the same, it provided that payment thereon should be made out of the net income of the road, after the interest on the bonds issued under the prior mortgage was duly paid. It seems clear to us that the circuit court did not err in holding that the lien of the mortgage was superior to the lien of the judgments, both as to the proceeds of the corpus of the property and as to the net income from the operation thereof while it was in the hands of the receiver. The decree of the circuit court is therefore affirmed.

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NOTES.

**Power of Railroad to Mortgage Corporate Property.**—See generally Georgia, etc., Ry. Co. (Ga.), 10 Am. & Eng. R. Cas., N. S., 446, and *note*, 455 *et seq.*

**Same—After-Acquired Property.**—See *note*, 12 Am. & Eng. R. Cas., N. S., 870 *et seq.* See generally *note*, 15 Am. & Eng. R. Cas., N. S., 294.

**Appointment of Receiver to Preserve Rents and Profits.**—See also Dowe v. Memphis & L. R. Co. (U. S.), 17 Am. & Eng. R. Cas. 324; Grant v. Phoenix M. L. I. Co., 121 U. S. 105; Lehman v. Tallassee Mfg. Co., 64 Ala. 567; Price v. Dowdy, 34 Ark. 285; Pasco v. Gamble, 15 Fla. 562; Haas v. Chicago Building Society, 89 Ill. 498; Main v. Ginthert, 92 Ind. 180; Douglass v. Cline, 12 Bush (Ky.) 608, 18 Am. Ry. Rep. 273; Lowell v. Doe, 44 Minn. 144; Phillips v. Eiland, 52 Miss. 721; Jacobs v. Gibson, 9 Neb. 380; Hyman v. Kelley, 1 Nev. 179; Oldham v. First Nat. Bank of Wilmington, 84 N. C. 304; Henshaw v. Wells, 9 Humph. (Tenn.) 568; Cheever v. Rutland & B. R. Co., 39 Vt. 653, 4 Am. Ry. Rep. 291; Schreiber v. Carey, 48 Wis. 208.

Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co

LACKAWANNA IRON & COAL COMPANY *et al.*

*v.*

FARMERS' LOAN & TRUST COMPANY *et al.*

(*Supreme Court of the United States, Jan. 29, 1900.*)

**Receiverships—Priority—Current Debts.\***—In the distribution of the current earnings of an insolvent railroad company, whose property is being administered by a receiver, mortgage creditors cannot be postponed to unsecured creditors, unless the debts due the latter are of the class known as current debts arising in the ordinary course of business and properly chargeable upon current receipts; and a claim for the price of rails imperatively required in order that the road might be safely used for the transportation of persons and property was not a current debt, within such rule, where the repairs required were so extensive as to amount to a reconstruction of the road.

WRIT OF CERTIORARI to the United States circuit court of appeals for the Fifth circuit. *Affirmed.*

Statement by MR. JUSTICE HARLAN:

The Houston & Texas Central Railway Company, a corporation of Texas, formerly owned and operated in that state several lines of railroad, as follows: From Houston to Denison, a distance of 345 miles, known as the main line; from Hempstead, on the main line, to Austin, a distance of 118¾ miles, known as the Western Division; and from Bremond, on the main line, to Ross, a distance of 58 miles, known as the Waco & Northwestern Division. It also owned lands donated by the state in aid of the construction of its roads.

Prior to April 1, 1881, the company had executed various mortgages or deeds of trust, namely: 1. A mortgage dated

See generally *Southern Ry. Co. v. Carnegie Steel Co., Ltd.* (U. S.), *ante* 1, where the leading cases are reviewed.



*Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co*

July 1, 1866, covering the main line and 10 sections of land for each mile, known as the main-line first mortgage, in which Easton and Rintoul were substituted trustees. 2. A mortgage dated December 21, 1870, covering the Western Division and 10 sections of land for each mile thereof, commonly known as the Western Division first mortgage, in which the same persons were substituted trustees. 3. A mortgage dated June 16, 1873, covering the Waco & Northwestern Division (to be hereafter referred to as the Waco Division) and also 6,000 acres of land for each mile thereof, commonly known as the Waco & Northwestern Division first mortgage, in which the Farmers' Loan & Trust Company, a New York corporation, was trustee. 4. A mortgage dated October 1, 1872, covering the main line and Western Division as a second mortgage and 3,840 acres of land per mile of completed road, commonly known as the main line and Western Division consolidated mortgage. 5. A mortgage dated May 1, 1875, commonly known as the Waco & Northwestern Division consolidated mortgage, and covering the Waco Division and 6,000 acres of land per mile of completed road. 6. A mortgage dated May 7, 1877, commonly known as the income and indemnity mortgage, and covering all the property of the railway company. 7. A mortgage dated April 1, 1881, commonly known as the general mortgage, and covering all the property of the company.

The present suit, designated in the circuit court by the number 227, was brought April 6, 1889, by the Farmers' Loan & Trust Company to obtain a decree of sale of the property covered by the mortgage of June 16, 1873, on the Waco Division. On the same day Charles Dillingham, who was already receiver and in possession of the railway property of the Houston and Texas Central Company, was appointed receiver of all the railway property and property covered by the first mortgage of the Waco Division with power to operate the same, and was directed to keep separate accounts of the expenditures and earnings of that division.

Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co

. During the progress of the cause the Lackawanna Iron & Coal Company, a Pennsylvania corporation, intervened by petition, asserting an equitable lien, prior to the claims of bondholders, on the mortgaged property for the value of steel rails alleged to have been furnished by it and laid on the Waco Division. Subsequently the Pacific Improvement Company, a California corporation, became the assignee of the claim of the Lackawanna company, and was made a coplaintiff with the latter company.

From a report made January 13, 1896, by a special master appointed to find and report upon the subject-matter of the intervening petition, the following facts appear :

Pursuant to a written contract with the Houston & Texas Central Railway Company, dated December 28, 1882, the Lackawanna company in the year 1883 delivered to the former 5,020 tons of steel rails at the price of \$40.40 per ton, in payment for which the Lackawanna company received ten promissory notes of the railway company, payable at six months from their respective dates, amounting with interest to \$206,932.16. These notes were all paid either at their maturity or at the maturity of other notes given in renewal thereof.

Pursuant to another contract dated April 26, 1883, between the Lackawanna company and the railway company, the former delivered to the latter in the year 1883, 5,009 tons of steel rails at \$39.50 per ton, and received in payment therefor the railway company's ten promissory notes dated respectively June 21, 22, and 23, 1883, August 10, 14, and 15, 1883, and September 6, 11, 15, and 20, 1883, each payable six months after date, and aggregating, with interest, \$201,346.64—the railway company being entitled, under the contract, to renew the notes at maturity for a further term of six months by paying the interest at 6 per cent. or adding the interest to the new notes. As these notes matured, the payment of so much of the debt as was not satisfied at maturity was extended until, in process of settlements and extensions, the railway company, in

## Lackawanna Iron &amp; Coal Co. v. Farmers' Loan &amp; Trust Co

the satisfaction of the balance due the Lackawanna company under the contract, executed its eight promissory notes payable four months from their respective dates, with 6 per cent. interest from maturity. These notes aggregated \$118,000. In the negotiations resulting in this settlement the Lackawanna company demanded that the railway company should secure the renewal notes by the hypothecation of collaterals. In compliance with that demand the railway company deposited with the Lackawanna company, when the renewal notes were delivered, 170 first-mortgage bonds of the Galveston, Harrisburg, & San Antonio Railway Company, of the face value of \$170,000. At the date of the master's report, January 13, 1896, the value of those bonds was \$157,250, or 92½ per cent. of their face value. They were in the possession of the Pacific Improvement Company, as assignee of the iron company. No interest on the bonds had been collected by the iron company or by the railway company, but the interest had been collected by the Southern Development Company. It was agreed before the special master by the parties in interest that the court should consider the 170 bonds as sold for \$157,250 on December 23, 1895, and should credit that sum, as of that date, upon the claim of the Iron Company or of the Southern Development Company.

On the 30th day of October, 1883,—nearly *six years before the present foreclosure suit was brought*,—the Lackawanna company and the railway company made another contract in addition to those above mentioned, under which the former delivered to the latter, during the months of February, March, April, and May, 1884, 8,552 tons of steel rails. That contract was similar in its general terms to those of December, 1882, and April, 1883. It provided for the delivery by the Lackawanna company of 10,000 tons of Bessemer steel rails at \$36.60 per ton, as nearly as practicable between February 1, and August 1, 1884, at the rate of 1,500 to 2,000 tons per month. It also provided that upon the delivery of each 500 tons of rails payment should be made therefor either in cash

## Lackawanna Iron &amp; Coal Co. v. Farmers' Loan &amp; Trust Co

or in the notes of the railway company payable at six months from the average date of delivery, with 6 per cent. interest from such date, the purchaser to have the privilege of renewing the notes before their maturity for a further term of six months by paying the interest or adding the same to the renewal notes. In March and April, 1884, the auditor of the railway company made a statement or voucher of rails then delivered under the contract. That statement passed into the hands of the treasurer of the railway company with a memorandum that notes were to be issued therefor payable at twelve months from their respective dates. In conformity with that memorandum the railway company executed and sent to the Lackawanna company eight notes, payable twelve (instead of six) months from their respective dates. The latter company thereupon notified the railway company of the error, but the notes as executed were received as a matter of accommodation to the railway company.

Afterwards, in April and May, 1884, the railway company, in settlement of the balance due for the 8,552 tons of rails, executed and delivered to the Lackawanna company nine promissory notes payable at six months from their respective dates, with the option in the maker of renewal for a like term. Each of those notes was renewed for six months for like amount as the originals, and their aggregate amount was \$127,175 50 This sum, added to the \$118,000 above referred to, made \$445,175.30, the aggregate principal amount due to the Lackawanna company, not including the \$157,250, the amount at which the 170 bonds delivered as collaterals were valued.

All the rails delivered under the first contract, and about one half of those delivered under the second contract, were paid for by the railway company prior to the appointment of any receiver of the property; but the remaining half under the second contract, and the rails furnished under the third contract, had not been paid for when the master's report was filed.

The second contract for rails was made one year and ten

*Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co*

months prior to the appointment of the receiver in cause numbered 185 (to be hereafter referred to), about three years and three months prior to the appointment of the receiver in consolidated cause numbered 198 (to be presently referred to), and about six years prior to the appointment of the receiver in this cause. The third contract was made about sixteen months prior to the receivership in cause 185, about two years and nine months prior to the receivership in consolidated cause 198, and about five years and six months prior to the appointment of the receiver in this cause.

About 6.2 miles of the railway of the Waco Division (the part of the railway covered by the mortgage to the Farmers' Loan & Trust Company) was laid with the rails furnished under the first two of the above contracts, but it was not shown what proportion of those rails was furnished under each of the contracts; 30.8 miles of the railway were laid with rails furnished under the third contract. The old iron rails removed from the 37 miles of the Waco Division, upon which the above rails were laid—2,960 tons—were received by the receivers in cause No. 185, and were sold by them in 1885 at the price of \$13 net.

The master's report contained the following:

"I find that the debt for which the Lackawanna company claims payment in its petition herein cannot be classed as a current debt made in the ordinary course of business, as those terms seem generally to be understood, yet it appears that at the time when the contracts hereinbefore mentioned were entered into between said Lackawanna company and the defendant railway company that the condition of the track of the defendant railway company was such that the demand for new rails upon the most worn portion of the roadway was practically imperative. For a number of years prior to December, 1882, only about 5,000 tons of new rails had been purchased. The road north from Houston for 90 miles was built in 1857-1861, and thence northward to Denison, 1867-1872. The Western Division leading to Austin was constructed in part prior to 1861, and completed in 1873, and the

Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co

Waco Division was completed about 1875. The condition of these roads was bad, except such portions as had been relaid with 5,000 tons of rails purchased prior to December 28, 1882. There was continual breakage of rails and wrecking of trains, the track was unsafe, and was generally so regarded, not only by 'railroad men,' but by the traveling public; the damage to merchandise, rolling stock, etc., was continuous, and the need for new rails appears to have been 'absolutely necessary as a preservation of human life, the loss of which was liable to occur at any moment.'

"I find that when the aforesaid contracts were made with the said Lackawanna company both seller and buyer expected the debts to be paid from the net income of the railway; that the credit extended under said contracts was at the request of and for the accommodation of the defendant railway company and upon its general credit. That said sales were made without any stipulation that security should be given by the defendant company for said rails, or that payment therefor should be made out of any particular fund or in any particular way; that said sales were for an unusually large amount of rails, and the defendant was unable to pay cash therefor, and there was no other way of obtaining said rails except upon credit; and petitioner herein at the time of said contracts and sales had knowledge of the mortgage of June 16, 1873, given by the defendant railway company upon the properties of its Waco & Northwestern Division to secure the first-mortgage bonds, which said mortgage has been herein foreclosed. I find that the steel rails supplied by said Lackawanna company under the afore-mentioned contracts, 18,581 tons, were placed in the track of the defendant railway company as soon as received."

The bonded debt of the railway company on January 1, 1885, was \$16,874,500. The interest on all classes of its bonds payable in 1894, amounting to \$1,194,200, was paid as it matured. The railway company first made default in the payment of interest on its bonds January 1, 1895, on which day the interest on first-mortgage bonds became payable.

*Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co*

The Southern Development Company, a California corporation, on the 16th day of February, 1885, instituted suit against the Houston & Texas Central Railway Company, asserting a claim against it for about \$500,000 for money loaned at various times. This was cause No. 185. It set forth in its bill the embarrassed condition of the railway company, the danger of its property being scattered, wasted, and lost, and asked that the company's property be put in the hands of receivers, and a decree passed directing that out of the rents, revenues, issues, and profits coming into the hands of the receivers, after payment of costs of administration, operating and other necessary expenses, the claims of the plaintiff, the Southern Development Company, with interest and costs, be paid. On the motion of that company, Clarke and Dillingham were appointed receivers of the property. They immediately qualified as receivers and took possession of the property. An amended and supplemental bill was filed making Easton, Rintoul, and the Farmers' Loan & Trust Company defendants as trustees of the various mortgages upon the railway company's property. Clarke and Dillingham continued to act as receivers until about July 10, 1886, when they delivered possession of the property and the revenues in their hands to Easton, Rintoul, and Dillingham, who had previously been appointed joint receivers of the railway company under bills filed by the trustees of certain mortgages on the main line and Western Division, and also by the Farmers' Loan & Trust Company as trustee in the general mortgage of the Houston & Texas Central Railway Company. The last-named litigation was known as cause No. 198.

In cause No. 185 the Lackawanna company intervened by petition, and asked to be made a coplaintiff. It prayed that an account be taken of its several demands, that the amount thereof with interest be paid out of the net revenues of the railway company, and be declared a lien thereon and upon all the property of the company superior in rank to the claims

## Lackawanna Iron &amp; Coal Co. v. Farmers' Loan &amp; Trust Co

of the trustees and to the mortgage bonds and coupons issued under their various deeds of trust.

To the bill of the Southern Development Company, Easton and Rintoul trustees, demurred generally and specially. The demurrer was sustained, and the bill and supplemental bill were dismissed with costs on the 27th day of May, 1886, but without prejudice to the rights of the complainants to assert their claims, if any they had, in such manner as they were advised. By the same decree Clarke and Dillingham were discharged and ordered to turn over all the property and effects of the railway company together with its accrued revenues in their possession to Easton, Rintoul, and Dillingham, who had then been appointed joint receivers of the railway company under an order made in the "Consolidated Cause No. 198," Easton and Rintoul, Trustees, and the Farmers' Loan & Trust Co. v. Houston and Texas Central Co. *et al.*—the constituent suits of such consolidated cause being causes Nos. 198, 199, and 201, which were bills of foreclosure against various parts of the railway.

The three mortgages declared on in causes 198, 199, and 201 were duly foreclosed by final decree entered in the consolidated cause on the 4th day of May, 1888, and on September 8, 1888, all the property of the railway company was sold under that decree, George E. Downs becoming the purchaser of the Waco & Northwestern Division, subject, however, to the particular mortgage sought in this suit to be foreclosed, namely, the mortgage of June 16, 1873, known as the Waco Division first mortgage, the Farmers' Loan & Trust Company being the trustee therein. The sale was also made subject to the right which the court reserved by the decree (to use the words of the master in his report) to charge upon the property or any part thereof the payment of any amount that might be found to be due and payable by reason of intervening petitions theretofore filed in that cause and be entitled to priority over the mortgage debts referred to in the decree.

From February 20, 1885, to the date of the report, the



## Lackawanna Iron &amp; Coal Co. v. Farmers' Loan &amp; Trust Co

property of the railway company, forming the subject-matter of the receivership in this cause, was continuously in the possession of the court under proceedings in suit No. 185, and thereafter in suits Nos. 198 and 227.

The master found and reported that no interest had been paid on the bonded indebtedness by either of the receivers in this cause; that Alfred Abeel, receiver in this cause, had expended under the orders of the court \$46,505.40 for betterments and permanent improvements from December 10, 1892, to September 3, 1895, consisting of bridges, shops, roundhouse, car shed, water stations, locomotives, chair car, and fencing; that no part of the income arising from the operation of the road and no part of the proceeds of sales of old rails, old iron, old cars, and engines, coming into the possession of the receivers in causes 185 and 198, ever came into the possession of the receivers in this cause, and it did not appear that any part of the equipments purchased by the receivers in causes 185 and 198 ever came into the possession of the receivers in this cause; that the evidence failed to show that any improvements and betterments of the property, added to the property of the Houston & Texas Central Railway Company by the receivers in causes 185 and 198, were made *on the Waco Division*; that prior to April 6, 1889, no separate accounts were kept of the receipts and disbursements of the Waco Division, but the same was operated as a branch of the general system of the Houston & Texas Central Railway Company, and the evidence failed to show what, if any, of the expenditures made by the receivers in causes 185 and 198 for extraordinary repairs, betterments, and improvements, and for operating and running expenses, were made for the Waco Division, and what portions for other divisions of the Houston & Texas Central Railway Company, and this was true also as to receipts and income; that the receivers in cause 185 had on hand in cash at the opening of business on January 21, 1886, \$175,393.65, but it did not appear that any part of that fund came to the hands of the receivers in this cause; and that the receiver in cause

Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co

198 had on hand at the beginning of business on April 6, 1889, cash amounting to \$215,842.45, but it did not appear that any part of that sum came to the hands of the receivers in this cause.

The mortgage given by the railway company to the Farmers' Loan & Trust Company, dated June 16, 1873, and herein declared on, contained the following provisions:

"And in case the said Houston & Texas Central Railway Company shall fail to pay the principal, or any part thereof, or any instalment of the interest, or any part thereof, on any of the said bonds at any time when the same shall become due and payable according to the tenor thereof, and for sixty days after having been demanded, it shall be competent for the said trustee, its successors or assigns, to enter upon the said railway and the premises and property herein conveyed, by its attorneys and agents, and take possession of the same without let or hindrance of the said first party, and every part and parcel thereof, and the appurtenances, and appoint an agent to operate and manage the same, and receive the revenue and income thereof, applying the said funds, after deducting taxes, necessary expenses, and counsel fees, to keep the same in good order and repair, and the surplus to pay the principal and interest of all the bonds which may be due and outstanding, and secured hereby *pro rata*, and thereafter, to the payment of any contributions due to the sinking fund herein established. And upon the request of the holders of one-fifth in amount of the bonds so in default which may be at any time outstanding under this deed of trust, it shall be the duty of said second party, by its president or agent duly appointed in its behalf, to enter upon and take actual possession with or without entry or foreclosure of said railway and property herein described, and all and singular each and every part and parcel thereof, and assume its management until the arrears of both principal and interest be paid, or the property sold, as herein prescribed, receiving the rents, revenues, and income thereof, and applying them in the same manner as above stated. It is,

## Lackawanna Iron &amp; Coal Co. v. Farmers' Loan &amp; Trust Co

however, expressly agreed that the said party of the first part may dispose of the current net revenues and income of all the said property and railway hereby conveyed in such manner as it shall deem best, until default shall be made in the payment of the interest or principal of said bonds, or of any one or more of them, and shall have the right to sell and dispose of any of such real estate or other property as it may own or acquire, which may not be needed or required for the purposes and business of the said Waco & Northwestern Division, except in the case of the 6,000 acres per mile of completed road, and which sale and conveyance of such outside property shall transfer the said property and title free from encumbrance of this mortgage or deed of trust, and to change its tracks and make any and all alterations necessary for the benefit of the same."

That mortgage contained no provision authorizing the trustee, if it acquired possession of the railway under that instrument, to pay any floating debt or debts of the mortgagor company out of the gross earnings of the railway.

During the receivership of Clarke and Dillingham, in cause 185, they received revenues from the operation of the railway, from February 23, 1885, to January 21, 1886, \$2,758,487.40, and paid out for operating expenses, taxes, etc., for the same period, \$2,137,322.44, leaving a surplus of \$621,164.96. From January 21, to July 10, 1886, they received \$1,143,731.-05, and paid out for operating expenses during the same period \$1,341,753.85, leaving a deficit for that period of \$198,022.80, but leaving a net balance from the operation of the railway from February 23, 1885, to July 10, 1886, of \$123,142.16. When Clarke and Dillingham took possession of the property of the railway company on February 23, 1885, they received in cash \$30,416.34, while they collected for traffic balances and other claims \$118,730.08, from sales of old rails on hand February 23, 1885, \$110,275, and from sales of old cars \$6,500, making a total of \$265,921.42.

Clarke and Dillingham during the time they were in possession of the property as receivers, and Easton, Rintoul,

## Lackawanna Iron &amp; Coal Co. v. Farmers' Loan &amp; Trust Co

and Dillingham, while they were in possession as receivers, expended under the orders of court the following sums outside of operating expenses: \$23,274.20 for liabilities of the railway company; \$751,438.15, interest on first-mortgage bonds of the company, due January 1 to July 1, 1885; \$245,793.64 for new steel rails; \$125,695.44 for car trust notes; \$265,696.33 for new passenger coaches, baggage, mail and express cars, locomotives, etc.; and \$126,218.62 for right of way, fencing track, real estate, depot, roundhouse, foundry, and patternhouse; in all, \$1,536,116.38, of which \$384,026.20 was expended under the receivership of Clarke and Dillingham. These were the receipts and expenditures up to January 9, 1888, and there was no evidence as to receipts and expenditures after that date.

Easton, Rintoul, and Dillingham during their receivership realized out of proceeds of sale or collection of old assets of the defendant company the sum of \$135,889.70.

The receivers in cause 198 received from the receivers in cause 185 the sum of \$138,751.37 in cash.

The receivers in the consolidated cause 198, after taking possession on July 10, 1886, paid liabilities of the receivers, Clarke and Dillingham, taxes, outstanding vouchers, pay rolls, traffic balances, \$221,421.32, and collected from the amount due Clarke and Dillingham as receivers in cause 185 the sum of \$39,016.69.

On the 26th day of November, 1886, the Lackawanna company filed its petition of intervention in cause 198, praying substantially for the same relief against all the railways, revenues, earnings, moneys, and other properties and assets of the defendant company, including those forming the subject-matter of the receivership herein, as was prayed for by its petition of intervention in this cause. Upon that petition the master reported in that cause that under the facts the debt for which the company filed its petition was of a character equitably entitling it to be discharged in preference to the mortgage represented in that suit, but which preference should be applicable to so much only of the company's debt

*Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co*

as should remain unsatisfied after exhausting the 170 first-mortgage 5 per cent. bonds of the Galveston, Harrisburg, & San Antonio Railway (Mexican & Pacific extension) of the face value of \$170,000, and which, as heretofore stated, were pledged as security. The Farmers' Loan & Trust Company filed exceptions in that cause to the master's report, but at the date of the master's report in this cause the exceptions had not been brought to a hearing.

The Lackawanna company on the 30th day of April, 1889, filed suit upon its claims against the Houston & Texas Central Railway Company in the district court of Dallas county, Texas, a court of competent jurisdiction, and in that suit, after due citation, judgment was rendered against the railway company May 19, 1899, for \$555,914.25 with interest. Upon that judgment execution was issued and was returned August 20, 1899, no property found subject to execution.

Of the interest paid by the receivers on the first-mortgage bonds of the defendant railway company, \$79,800 consisted of coupons upon the first-mortgage bonds of the company secured by mortgage upon the Waco Division, being the property forming the subject-matter of the litigation herein. Interest was paid upon the coupons representing the same, maturing January 1 and July 1, 1885, to the amount of \$11,571, making a total amount of interest paid to holders of bonds secured by mortgage on the Waco Division of \$91,371, paid May 1, 1887.

During the years 1883 and 1884 the defendant company paid \$2,386,400 interest upon its bonds, which amount, less \$1,043,198.27, borrowed for interest purposes in those years, was presumably (the contrary not appearing) paid from its income or current earnings, and out of said total the sum of \$159,600 was paid as interest upon the first-mortgage bonds of the Waco Division, the bonds which are the subject-matter of the bill of complaint in this cause. During 1883 and 1884 \$2,225,000 approximately were expended from the earnings and general income of the defendant company's property in

Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co

the payment of interest on bonds and in additional equipments, permanent improvements, etc.

The accounts of the railway company were not kept in such manner as to indicate the exact fund out of which the interest on the first-mortgage bonds of the Waco Division was paid, or the exact fund out of which the interest upon the bonds of the other divisions was paid; and no separate account was kept of the earnings of that division as distinguished from the net earnings of the other divisions of the railway company, either prior to or during the receivership thereof until about April 20, 1889. During the receivership in cause 198, the receivers expended in the payment of interest upon the bonds forming the subject-matter of the bill of foreclosure herein the sum of \$91,371.

By a final decree rendered March 16, 1892, the circuit court made in this cause a decree of foreclosure and sale in behalf of the Farmers' Loan & Trust Company. The decree contained these among other provisions:

"And the purchaser or purchasers of said property at said sale shall, as a part of the consideration of the purchase, and in addition to the sum bid, take the property upon the express condition that he or they will pay off, satisfy, and discharge any and all claims and interventions now pending and undetermined in this court, accruing prior to the appointment of the receiver herein or during the receivership, which may be allowed and adjudged by this court as prior in right to complainant's mortgage, together with such interest as may be allowed; and also upon the further express conditions that he or they will pay off, satisfy, and discharge all debts, claims, and demands of whatsoever nature incurred or which may hereafter be incurred by said receiver Charles Dillingham, and which have not been or shall not hereafter be paid by said receiver or other parties in interest herein; and said purchaser or purchasers, their successor or successors, or assigns, shall also have the right to appear and make defense to any claim, debt, or demand sought to be enforced against said property; and said purchaser or pur-

*Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co*

chasers, their successor or successors or assigns, shall also have the right to appear and make defense to any claim, debt, or demand pending and undetermined at the date of the confirmation of such sale. . . .

"And it is further ordered, adjudged, and decreed that it be recited in the deed to be executed and delivered to said purchaser or purchasers, that he or they do take said property, subject to, and that said purchaser or purchasers do assume and agree to pay off, any and all debts, claims, and demands of whatsoever nature now pending and undetermined, and which may be allowed and adjudged by this court as prior to any right secured under complainant's mortgage, and subject likewise to all debts, claims, and demands of whatsoever nature incurred by Charles Dillingham as receiver in this cause, and which may remain unpaid at the termination of said Dillingham's receivership, provided the same be presented, as hereinbefore provided, within six months after the confirmation of said sale. It is further ordered, adjudged, and decreed that the rights of the Lackawanna Coal & Iron Company, the Southern Development Company, the Pacific Improvement Company and the Morgan's Louisiana & Texas Railroad & Steamship Company, interveners herein, and the rights of all other interveners herein, be and they are hereby reserved to be hereinafter adjudicated, and are in no manner affected or prejudiced by this decree. It is further ordered that the disposition of any surplus funds arising from the earnings of the road, or otherwise, that may be in the hands of the receiver, is reserved for future determination."

Subsequently, February 26, 1896, a decree was passed in this cause dismissing the intervention herein by the Lackawanna Iron & Coal Company and the Pacific Improvement Company, but without prejudice to the rights of those companies under or by virtue of the intervention in equity cause 198.

This order was affirmed in the circuit court of appeals.

Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co

52 U. S. App. 91, 79 Fed. Rep. 202, 24 C. C. A. 487. The case is now here on *certiorari* for re-examination.

*Messrs. Maxwell Evarts, E. B. Kruttschnitt, E. H. Farrar, B. F. Jonas and H. T. Gurley*, for petitioners.

*Messrs. Herbert B. Turner, L. W. Campbell and M. F. Mott*, for respondents.

MR. JUSTICE HARLAN, after stating the above facts, delivered the opinion of the court :

In *Southern R. Co. v. Carnegie Steel Co.* 175 U. S. —, 17 Am. & Eng. R. Cas., N. S., 1, 20 Sup. Ct. Rep. 347, *ante*, p. 347, just decided, we had occasion to consider in the light of our previous decisions the principal questions arising in the present case. We need not repeat here what was said in the opinion in that case as to the general principles applicable in cases involving the respective rights of mortgage creditors and of unsecured creditors in the earnings of an insolvent railroad corporation in the hands of a receiver.

The above statement of the history of this litigation shows that the Houston & Texas Central Railway Company had three contracts with the Lackawanna company for steel rails; that those contracts were made, respectively, on December 28, 1882, April 26, 1883, and October 30, 1883; and that all the rails delivered under the first contract, and about one-half of those delivered under the second contract, were paid for, leaving unpaid for one-half of the rails delivered under the second contract and all delivered under the third contract. But the claim for the balance due for rails covered by the contract of April 26, 1883, is abandoned because, as stated by counsel for the Lackawanna company, it is impossible to state with certainty how many of the rails delivered under that contract were actually used on the Waco Division. We are therefore only concerned in this case with the contract of October 30, 1883, under which rails were delivered.

It also appears that in suit No. 185, brought by the



*Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co*

Southern Development Company in February, 1885, receivers were appointed of the entire property of the Houston & Texas Central Railway Company, including the Waco Division; that that suit was dismissed in May, 1886, and shortly before that time suits were brought by the trustees of the mortgages on the main line and on the Western Division of that company for the foreclosure of those mortgages, receivers were appointed, and the suits were consolidated as "Consolidated Cause 198;" that in the latter cause the entire property was sold September 8, 1888, subject, however, to the first mortgage on the Waco Division; and that the Waco Division was separately sold subject to the first mortgage thereon.

Subsequently, September 6, 1889, the present suit was brought to foreclose the first mortgage on the Waco Division. The Lackawanna company intervened herein by petition, asking that an account be taken of the amounts due to it, and for a decree "declaring that the sums so due are liens upon the net earnings of said railway company, and especially upon those portions of said net earnings which have accrued or may accrue from the railways described in the bill of complaint in this cause, both those accrued prior to said receivership in said cause No. 185, and those accrued and to accrue during the receivership in said cause No. 198, extended to this cause, and upon all of the property of said railway company, superior in rank to the claims of said trustee and of the mortgage bonds and coupons issued under the deed of trust sought to be foreclosed in this cause;" and "that the net earnings of the railway described in the bill of complaint in this cause in the hands of said receiver, accrued or to accrue, be first devoted to the payment of the accounts so decreed, and if they be not sufficient prior to the final decree in this cause to pay said amounts, then that your honors do decree the payment of said amounts out of any proceeds of sale of the property of said railway company to be made under said

*Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co*

final decree, the amounts so decreed to your petitioner to be paid in preference to any amount due under the mortgage bonds and coupons issued under the deed of trust annexed to the bill of complaint in this cause."

The principal ground upon which the Lackawanna company bases its claim for the relief asked is that when each of the above contracts was made the Waco Division was in such condition that new rails were imperatively required in order that the road might be safely used for the transportation of persons and property. Such, it may be assumed, was the condition of the road when the rails were contracted for and delivered, for it was so found by the master to whom the intervening petition of the Lackawanna company was referred with direction to take the account prayed for and to report the facts, and to that report no exceptions were filed. But the necessary inference from the report in connection with the averments of the intervening petition is, that the work required to be done in order to put the main road of the Houston & Texas Central Railway Company and its divisions in proper condition was not such as would be done in the ordinary course of the business and operations of a railroad, but was so extensive as to amount to reconstruction, or the construction of new road. That was the view expressed by the circuit court of appeals, and it explains what the master meant by the finding that the debt for which the Lackawanna company claimed payment could not be classed as a "current debt made in the ordinary course of business." This court has uniformly held that in the distribution of the current earnings of an insolvent railroad company, whose property is being administered by a receiver, mortgage creditors could not be postponed to unsecured creditors, unless the debts due the latter were of the class known as current debts arising in the ordinary course of business and properly chargeable upon current receipts. The decision in each case has been more or less controlled by its special facts. But we are of opinion that such expenditures as those incurred in the

*Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co*

making of the contracts with the Lackawanna company were not such as are made in the ordinary course of the operations of a railroad, and cannot be deemed current debts within the rule that a railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business, in order to keep it a going concern, shall be paid out of current receipts before he has any claim upon such income. *Southern R. Co. v. Carnegie Steel Co.* and authorities there cited, 175 U. S. —, 17 Am. & Eng. R. Cas., N. S., 1, 20 Sup. Ct. Rep. 347, *ante*, p. 347. They are rather to be regarded as extraordinary expenditures, outside of the ordinary course of business and incurred for purposes, not of repair, but of construction. This court has said that it is the exception, not the rule, that the priority of mortgage liens can be displaced. *Kneeland v. American Loan & T. Co.*, 136 U. S. 89, 98, 34 L. Ed. 379, 383, 10 Sup. Ct. Rep. 950; *Thomas v. Western Car Co.*, 149 U. S. 95, 111, 37 L. Ed. 663, 13 Sup. Ct. Rep. 824. We have said that priority of unsecured claims is recognized only in a few specified cases in which equity and good conscience require that the vested liens of mortgage creditors shall be postponed in the application of current earnings to current debts. Sound principle forbids that a court of equity should imply an agreement upon the part of mortgage creditors to subordinate their claims to such debts as those due to the Lackawanna company. To so hold would place their rights at the mercy of the railroad company having charge of the property upon which their recorded liens rest. Besides, the rails in question were delivered long before the railroad company had made any default in the payment of interest; about sixteen months before the company's property was put into the hands of a receiver, and about five and a half years before the appointment of a receiver in this cause. Then there is the circumstance that the Lackawanna company, during the negotiations resulting in the execution of renewal notes

## Lackawanna Iron &amp; Coal Co. v. Farmers' Loan &amp; Trust Co

under the second contract for rails, demanded and received collateral security to a large amount from the railroad company—a circumstance tending to show that it did not regard itself as entitled to an equitable claim upon net earnings in preference to mortgage creditors, but relied upon the general credit of the railroad company. However meritorious the claim of the Lackawanna company may be as between it and the railroad company, we cannot, by reason of any thing appearing in the record, impair or displace the liens of mortgage creditors for its benefit. Under all the circumstances, including the amount of the debt and the long period of credit, the claims in question must be regarded as general, unsecured debts not contracted in the ordinary course of business and with the expectation of the parties that they were to be met out of current receipts in preference to claims of mortgage creditors. It is not therefore entitled to the priority claimed. The view taken of the case by the circuit court of appeals is indicated by JUDGE PARLANGE, whose opinion, on behalf of that court, thus concludes: "The unusually large purchase of rails, the time within which they were to be delivered, the condition of the road, the contracts providing for notes at six months renewable for a like term at the maker's option, the hypothecation of securities for the payment of the claim, the knowledge which the intervener had of the mortgage, the fact that the contracts contained no promise to pay out of any particular fund, the time which elapsed between the date of the contracts and the appointment of a receiver in cause No. 185—are circumstances which, taken together, cannot fail to convince us that the intervener relied upon the general credit of the railway company."

*The decree of the Circuit Court of Appeals is therefore affirmed.*

United States *v.* Harris *et al.*, Receivers P. & R. R. Co

UNITED STATES

*v.*

HARRIS *et al.*, RECEIVERS OF THE PHILADELPHIA &  
READING RAILROAD COMPANY.

(*Supreme Court of the United States, April 9, 1900.*)

**Cruelty to Animals in Transit—Penal Statute—Liability of Receivers.\***—A receiver operating a railroad cannot, as such, be held liable in an action under the federal statute providing that live stock while being transported by railroad from one state to another shall not be confined in cars for a longer period than 28 consecutive hours, without being unloaded for rest, water and feeding; and that "any company, owner, or custodian" of such live stock violating the statute shall be liable to a penalty recoverable in a civil action.

WRIT OF CERTIORARI to the United States circuit court of appeals for the Third circuit. *Affirmed.*

Statement by MR. JUSTICE SHIRAS:

This was a suit brought in November, 1895, in the district court of the United States for the eastern district of Pennsylvania, by the United States against Joseph S. Harris, Edward M. Paxson, and John Lowber Welsh, receivers of the Philadelphia & Reading Railroad Company, to recover a penalty in the sum of \$500 for an alleged violation of §§ 4386, 4387, 4388, and 4389 of the Revised Statutes of the United States.

There was a verdict in favor of the United States, but afterwards, on a question reserved at the trial, judgment was entered in favor of the defendants *non obstante veredicto*. 78 Fed. Rep. 290. Thereupon a writ of error was sued out from

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\*See Wall *v.* Platt (Mass.), 9 Am. & Eng. R. Cas., N. S., 563; Peirce *v.* Van Dusen (C. C. A.), 7 Am. & Eng. R. Cas., N. S., 1; Robinson *v.* Huidekoper (Ga.), 5 Am. & Eng. R. Cas., N. S., 216, and *note*, p. 218.

United States *v.* Harris *et al.*, Receivers P. & R. R. Co

the circuit court of appeals for the third circuit, and on March 14, 1898, the judgment of the district court was affirmed. 57 U. S. App. 259, 85 Fed. Rep. 533, 29 C. C. A. 327. The cause was then brought to this court on a writ of *certiorari*.

*Solicitor General Richards*, for petitioner.

*Mr. John G. Lamb*, for respondents.

MR. JUSTICE SHIRAS delivered the opinion of the court :

This was an action to recover penalties for an alleged violation of the laws of the United States relating to the transportation of live stock ; and the question involved is whether the defendants, who were in charge and control of the Philadelphia & Reading Railroad as receivers, appointed by the circuit court of the United States, were liable in such an action.

The act under which this suit was brought was passed March, 3, 1873, and was entitled "An Act to Prevent Cruelty to Animals while in Transit by Railroad or Other Means of Transportation within the United States." It appears in the Revised Statutes as §§ 4386, 4387, 4388, and 4389, as follows :

"Sec. 4386. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated.

United States *v.* Harris *et al.*, Receivers P. & R. R. Co

"Sec. 4387. Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company or owners or masters of boats or vessels transporting the same at the expense of the owner or person in custody thereof; and such company, owners, or masters shall in such case have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals.

"Sec. 4388. Any company, owner, or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections, shall, for every such failure, be liable for and forfeit and pay a penalty of not less than \$100 nor more than \$500. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

"Sec. 4389. The penalty created by the preceding sections shall be recovered by civil action in the name of the United States, in the circuit or district court of the United States, holden within the district where the violation may have been committed, or the person or corporation resides or carries on its business; and it shall be the duty of all United States marshals, their deputies and subordinates, to prosecute all violations which come to their notice or knowledge."

The contention on behalf of the government is that, by the words "any company," used in § 4388, Congress intended to embrace all common carriers, whether by rail or water, upon whom the duty was imposed by § 4386 of unloading and feeding the animals; that the word "company" is used in a popular sense as signifying the person or persons, the association or corporation, carrying on the business of a common carrier by rail or water; that, as shown by its title, the act in question was a humane one, designed to prevent cruelty to animals while in course of interstate transit; that the regulations were to be complied with whenever animals were

United States *v.* Harris *et al.*, Receivers P. & R. R. Co

transported by rail or boat from one state or another; and that whoever had charge of the railroad or the boat had to see that these wholesome and humane regulations were obeyed, or had to pay the penalty for violating them.

To strengthen the argument that Congress intended to include even receivers when managing a railroad under an appointment by a court, the government's counsel calls attention to the provisions of the 2d and 3d sections of the act of August 13, 1888 (25 Stat. at L. 436, chap. 866), reading as follows:

"Sec. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

It is claimed that the effect of such legislation is to place receivers upon the same plane with railway companies as respects their liability to be sued for acts done while operating a railroad.

Upon the whole, the proposition of the government's



United States *v.* Harris *et al.*, Receivers P. & R. R. Co

counsel is that the words "any company, owner, or custodian of such animals," used in § 4388, are intended to cover all those who can possibly violate the preceding two sections; that the words "every company" must, therefore, be held to include a railroad company, whether a person, a partnership or a corporation, and whether acting individually, or through officers or receivers.

It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulations of the states and of the United States, whose object is to promote the safety, comfort, and convenience of the traveling public. But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit was brought. Was it the purpose of Congress when prescribing a penalty for any company, owner, or custodian of animals who knowingly and willingly fails to comply with the directions of the statute, to include receivers? Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the act?

It was the view of the courts below that receivers were plainly not within the letter of the statute, and not necessarily within its purpose or spirit; and an attentive examination has brought us to the same conclusion.

It must be admitted that, in order to hold the receivers, they must be regarded as included in the word "company." Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its

United States *v.* Harris *et al.*, Receivers P. & R. R. Co

fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.

It may well be that Congress, in omitting to expressly include receivers in these sections, intended to leave them subject to the control and direction of the courts, whose officers they are. It does not, therefore, follow that the statute in question would be without operation where railroads are in the hands of receivers. The owners and custodians of the stock would still remain subject to the punishment prescribed.

We cannot better close this discussion than by quoting the language of CHIEF JUSTICE MARSHALL, in the case of *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37 :

"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. . . . But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be

## Union Refrigerator Transit Co. v. Lynch, Treasurer

collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words,—especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases." See likewise *Sarlls v. United States*, 152 U. S. 570, 38 L. Ed. 556, 14 Sup. Ct. Rep. 720.

*The judgment of the Circuit Court of Appeals is affirmed.*

## UNION REFRIGERATOR TRANSIT COMPANY

v.

## LYNCH, TREASURER OF SALT LAKE COUNTY.

(*Supreme Court of the United States, April 9, 1900.*)

**Foreign Corporations—Taxation of Refrigerator Car Used for Interstate Commerce.\***—Where a corporation of one state brings into another, to use and employ, refrigerator cars, it is legitimate for the latter state, although the corporation has no domicile or place of business therein, to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens; and it is immaterial that such cars are not continuously the same, but are continuously changing, according to the exigencies of the business,

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\*See note, 13 Am. & Eng. R. Cas., N. S., 874.

Union Refrigerator Transit Co. v. Lynch, Treasurer

as the tax may be fixed by an appraisalment of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were used as vehicles of transportation in the interchange of interstate commerce render their taxation invalid.

**Same — Same — Presumptions.**—In an action to recover money paid for taxes so imposed on cars so used, the presumption is that the action of the state taxing officers was correct and regular, and that the number of cars assessed by the state board of equalization was the average number so used and employed in the state by plaintiff.

**ERROR** by plaintiff to the state of Utah supreme court.  
*Affirmed.*

See, 18 Utah 378, 13 Am. & Eng. R. Cas., N. S., 868, 55 Pac. 639.

**Statement by MR. CHIEF JUSTICE FULLER :**

The Union Refrigerator Transit Company filed its bill in the district court in and for Salt Lake county, state of Utah, against Stephen H. Lynch, treasurer of Salt Lake county and collector of taxes therein, alleging: "That it is and was during all the times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the state of Kentucky; that its principal office and place of business is in the city of Louisville, in said state, and was and is engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over the various lines of railroads throughout the United States and of soliciting shipments for such cars and giving to the said cars needful attention at various points in transit; that the said cars are and were during the said times the sole property of the plaintiff, and are not and were not during any of the said time allotted, leased, rented, or furnished under contract to any railroad company or companies or carriers of freight; nor were they run on any particular line or lines of railroad; nor were they confined to any particular route or routes, nor in any particular trains, nor at any specified or agreed times, but are and were run indiscriminately over the lines of railroad over which consignors

## Union Refrigerator Transit Co. v. Lynch, Treasurer

of freight shipped in such cars choose to route them in shipping.

The plaintiff further alleges that the business in which said cars, including the cars hereinbefore mentioned, are and were during the said times engaged was exclusively interstate commerce business, being confined to interchange and transportation of perishable products of the various parts of the United States from points in some of said states to points in others of the said states; that plaintiff has not now and has not had any office or place of business within the state of Utah, and that all freight transported in plaintiff's cars in or through the state of Utah, including the cars hereinafter mentioned, was transported in said cars either from a point or points in a state of the United States outside of the state of Utah, to a point or points within the state of Utah or from a point or points within the state of Utah to a point or points without the state of Utah, or between points neither of which were within the state of Utah; and that said cars were within the said state of Utah at no regular intervals nor in any regular number, and when in said state of Utah were only within it in transit, except to load or unload freight shipped from within out of said state or coming into said state from without the same or in the transportation of freight entirely through or across said state, and at such times the said cars were only transiently present for the said purposes, and not otherwise.

And plaintiff further alleges that said cars do not abide, nor have they at any time had any situs, within the said state of Utah, nor has this plaintiff, nor has it heretofore at any time had, other property of any description whatsoever located within the state of Utah.

And plaintiff alleges that its cars so used as hereinbefore stated, and not otherwise, are not subject to tax within the said state for any purpose whatsoever.

That, notwithstanding the aforesaid facts, the state board of equalization of the state of Utah unlawfully and wrongfully on the 14th day of August, 1897, assessed and valued, of the

Union Refrigerator Transit Co. v. Lynch, Treasurer

property of the plaintiff, ten cars of the aggregate assessment of \$2,600, for all purposes of county and state taxation for the year 1897, and thereafter wrongfully and unlawfully apportioned the said assessment to the several counties in the said state of Utah through which lines of railway pass and over which the said cars might pass or be transported; that, among the counties to which said apportionment was made was the county of Salt Lake, and there was by the said board apportioned to said county of Salt Lake of the said assessment the sum of \$210.

That the taxes levied upon the said property so assessed and apportioned to Salt Lake county for state, state school, county, city, and city school taxes amounted to the sum of \$5.76; that the said tax was and is by reason of the aforesaid facts illegal and void."

Plaintiff then averred the payment of the tax, under written protest, claiming the tax to be illegal, in order to avoid the seizure and sale of its property, and to prevent incurring the penalties provided by law, and prayed judgment for the sum of \$5.76 and interest, and for cost. Defendant filed a general demurrer to the complaint, which was sustained, and, plaintiff electing not to amend but to stand on its complaint, judgment of dismissal, with costs, was entered. The cause was then taken to the supreme court of Utah and the judgment affirmed.. 18 Utah 378, — L. R. A. —, 55 Pac. 639. Thereupon this writ of error was allowed by the chief justice of that court.

*Messrs. Percy Werner and Parley L. Williams*, for plaintiff in error.

*Messrs. Joseph L. Rawlins and Charles S. Varian*, for defendant in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court :

The Constitution of the state of Utah provided that: "All property in the state, not exempt under the laws of the United States or under this Constitution, shall be taxed in propor-

## Union Refrigerator Transit Co. v. Lynch, Treasurer

tion to its value, to be ascertained as provided by law;" and that: "All corporations or persons in this state, or doing business herein, shall be subject to taxation for state, county, school, municipal, or other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax." Const. art. 13, §§ 2, 10.

Some question was raised in the supreme court of Utah as to the proper construction and scope of the state statutes in respect of taxation, but the court held that by those laws all property owned or used by railway, car, telephone, telegraph, and other companies, within the territorial limits of the state, was subjected to taxation according to its value, regardless of the domicile of its owner.

The contention on this writ of error is that the taxation of the ten cars of plaintiff in error was forbidden by the Constitution of the United States because they had no situs for that purpose in the state of Utah, and the tax imposed a burden on interstate commerce.

In *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. Ed. 899, 19 Sup. Ct. Rep. 599, quotations were made from the opinions in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 30, 46 Am. & Eng. R. Cas. 236, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. Rep. 305, and *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. Ed. 965, 17 Sup. Ct. Rep. 604, and the conclusion of the court was thus expressed: "It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but

Foreign Corporations—Taxation of Refrigerator Car Used for Interstate Commerce.

Union Refrigerator Transit Co. v. Lynch, Treasurer

were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid."

The case before us involves the taxation by the state of Utah of certain cars belonging to a corporation of Kentucky; the case cited involved the taxation by the state of Colorado of certain cars belonging to a corporation of Illinois; and if this case comes within the rule laid down in that case, nothing further need be said.

In that case the facts were stipulated; and it appeared that the American Refrigerator Transit Company was a corporation duly organized and existing by virtue of the laws of the state of Illinois, with its principal office in the city of East St. Louis in said state; that it was engaged in the business or furnishing refrigerator cars for the transportation of perishable product over the various lines of railroads in the United States; that these cars were the sole and exclusive property of the plaintiff, and that the plaintiff furnished the same to be run indiscriminately over any lines of railroad over which shippers on said railroads might desire to route them in shipping, and furnished the same for the transportation of perishable freight upon the direct request of shippers or of railroad companies requesting the same on behalf of shippers, but on the responsibility of the carrier and not of the shipper; and plaintiff had not and never had had any contract of any kind whatsoever by which its cars were leased or allotted to or by which it agreed to furnish its cars to any railroad company operating within the state of Colorado; that it had and had had during said times no office or place of business nor other property than its cars within the state of Colorado, and that all the freight transported in plaintiff's cars in or through the state of Colorado, including the cars assessed, was transported



## Union Refrigerator Transit Co. v. Lynch, Treasurer

in such cars either from a point or points of the United States outside of the state of Colorado to a point in the state of Colorado, or from a point in the state of Colorado to a point outside of said state, or between points wholly outside of said state of Colorado, and said cars never were run in said state in fixed numbers nor at regular times, nor as a regular part of particular trains, not were any certain cars ever in the state of Colorado, except as engaged in such business aforesaid, and then only transiently present in said state for such purposes.

All these matters were set up, *mutatis mutandis*, in the complaint in this case, in substantially the same language employed in setting forth the facts in that case. But it was also there stipulated: "That the average number of cars of the plaintiff used in the course of the business aforesaid within the state of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceeds the sum of \$250 per car, and that if such property of the plaintiff is assessable and taxable within such state of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said state board of equalization is just and reasonable, and not in excess of the value placed upon other like property within said state for the purposes of taxation."

The complaint in this case contained no averment as to the average number of cars of plaintiff in error used in the state of Utah, but it did show that the company was doing business in Utah in the year for which the tax in question was levied, and that it was running its cars into and through the state, using, employing, and caring for them there for profit, in the same manner as the cars in that case, and it was not alleged that the assessment by the state board of equalization was unreasonable, or unjust, or in excess of the valuation of other like property for taxation, or that the method of apportionment was erroneous. The presumption is that the action of the taxing officers was correct and regular, and that the number of cars assessed by

Same-Same-  
Presumptions.

Eel River R. Co. v. State *ex rel.* Kistler

the state board of equalization was the average number used and employed by plaintiff in error in the state of Utah during 1897.

The objection is not that too many cars were assessed, or that they were assessed too much, or in an improper manner, even if we could consider such questions, but simply that they could not be taxed at all. And this objection was considered and overruled in the case to which we have referred.

*Judgment affirmed.*

MR. JUSTICE WHITE did not hear the argument, and took no part in the consideration and disposition of this case.

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EEL RIVER R. CO. *et al.*

*v.*

STATE *ex rel.* KISTLER, PROSECUTING ATTORNEY.

(*Supreme Court of Indiana, May 18, 1900.*)

**Jurisdiction—Waiver.**—In all transitory actions objections to the jurisdiction of the court over the person of defendant may be waived, and in such an action, a full appearance, the filing of divers motions, and a plea in bar, must be conclusively presumed to constitute a waiver by any such objection.

**Forfeiture—Quo Warranto—Jurisdiction—Service of Process.**—In a proceeding by information in the nature of a *quo warranto* against a domestic railroad corporation to have its corporate privileges declared forfeited, it appeared that, so long as the corporation held possession of and operated its railroad, its principal offices and place of business were at a certain point within the state in C. county; that at no time since the transfer of the use and possession of its railroad to other corporations had it any office for the transaction of its business as a railroad company in any county of the state; but that after the surrender of its railroad and business to another company, the annual meetings of its stockholders were held within the state in D. county; and that, for the purpose of defeating the jurisdiction of the C. county circuit court, after the commencement of the action, it maintained a nominal agent in D. county to receive

*Eel River R. Co. v. State ex rel. Kistler*

service of process. *Held*, that, the action was properly brought in C. county; and that the service of summons on such agent in D. county was legal service upon the company, a statute authorizing a service of such summons in any county in the state where an agent of the company could be found.

**Railroad Leases—Statute.**—The act of March 3, 1865, of Indiana, permitting the leasing of railroads, applies to intersecting and continuous lines only.

**Corporations—Causes of Forfeiture.**—While certain specific acts and omissions may, by statute, be made causes of forfeiture of the charter or franchises of corporate bodies, yet it is generally recognized that misuser and nonuser of such franchises, even where the specific offences are not particularly defined by statute, are sufficient grounds for proceedings for forfeiture and dissolution.

**Railroad Leases—Public Policy.\***—The unauthorized lease of a railroad to a competing company is against public policy.

**Railroad Corporations—Causes of Forfeiture.†**—A lease in perpetuity to a competing railroad company, a total surrender of the railroad, its property and franchises, an abandonment of the control and management, the wrecking and destruction of a considerable part of the line of the railroad, the dismantling and removal of roundhouses and machine shops, the closing of all its offices and agencies, the discharge of all employees, agents and officers in the state, the removal of all books and papers relating to the business from the state, and the management of the lessor's affairs by the officers of a competing line without regard to the interests or duties of the line controlled, constitute a state of facts sufficient to sustain a judgment of ouster against both companies and a dissolution of the lessor, a domestic railroad corporation.

**Civil Action—Change of Venue—Parties.**—Such a proceeding is a civil action, and a change of venue therein did not require a change of parties.

**Case at Bar.**—The special findings of fact were entirely consistent with the general verdict, and there was no error in overruling defendants' motion for judgment in their favor.

**New Trial.**—The motion for new trial was properly overruled.

**Appointment of Receiver.**—In such a proceeding, where the judgment is against the railroad, the appointment of a receiver to take possession of its property is authorized by a statute of Indiana.

**APPEAL** by defendants from Howard county superior court.  
*Affirmed.*

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\*See *East St. Louis Connecting Ry. Co. et al. v. Jarvis* (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 459, and *notes*, 476 *et seq.*

†See notes at end of case.

Eel River R. Co. v. State *ex rel.* Kistler

*Stuart Bros. & Hammond, Henry Crawford, and Blacklidge & Shirley*, for appellants.

*W. A. Ketcham, George S. Kistler, M. Winfield, Bell & Purdum, McConnell & Jenkins*, and *Geo. C. Taber*, for appellee.

DOWLING, J. This was a proceeding by information in the nature of a *quo warranto*, filed in the Cass circuit court by the prosecuting attorney of Cass county against the Eel River Railroad Company, a domestic corporation, charging it with doing and omitting acts amounting to a surrender and forfeiture of its rights and privileges as a corporation, and demanding a judicial declaration of such surrender and forfeiture. The Wabash Railroad Company, as the lessee of the railroad and property of the Eel River Railroad Company, and a participant in the alleged wrongful acts and omissions of the Eel River Railroad Company, was properly joined as a co-defendant with that Company. Burns' Rev. St. 1894, § 269; *Bittinger v. Bell*, 65 Ind. 445.

Case Stated.

On a former appeal, by the defendants below, the judgment of the Fulton circuit court, to which the cause had been transferred upon a change of venue asked for by the defendants, was reversed for the reason that the Cass circuit court, in which the suit was originally brought, had not obtained jurisdiction of the person of the Eel River Railroad Company. An attempt to bring the Eel River Railroad Company within the jurisdiction of the Cass circuit court had been made by issuing two writs of summons to the sheriff of said Cass county, requiring the said company to appear to said action, and to plead to the information therein, on June 7, 1893, and causing the same to be served on the said company by reading to its secretary, in the state of Massachusetts, and to one of its directors, in the state of Michigan. On such former appeal it was held by this court that the service of the writs, so made out of this state, was illegal, for the reason that the Eel River Railroad Company was organized under the laws of this state, and was, therefore, a resident of the state, and

Eel River R. Co. v. State *ex rel.* Kistler

could not migrate. Eel River R. Co. v. State, 143 Ind. 231, 42 N. E. 617. The mandate of this court was that the judgment of the Fulton circuit court be reversed, that the said court remand the cause to the Cass circuit court, and that the last-named court sustain the motion of the Eel River Railroad Company to set aside the service of process. Subsequently, on the 12th day of February, 1896, an alias summons for the Eel River Railroad Company, was issued to the sheriff of Cass county, and was returned not served, because that corporation was not found in Cass county, and had no officer or person authorized to transact its business residing in that county upon whom process could be served. Similar writs were issued on the same day, February 12, 1896, to the sheriffs of the counties of Miami, Wabash, Kosciusko, Whitley, Allen, Noble, and Dekalb, respectively, these being all of the counties in which and through which the railroad of the said Eel River Railroad Company was constructed, and to each of these writs a like return of "Not found," etc., was made. An order for notice to the Eel River Railroad Company by publication, under section 1 of an act approved December 21, 1858 (Acts 1858, p. 42), was next taken by the plaintiff below. The Eel River Railroad Company thereupon entered a special appearance to the action, and moved to set aside the order of publication on the ground, among others, shown by affidavit filed on behalf of the said company in support of its motion, that prior to February 12, 1896, and ever since that date, one William V. Troutman, a citizen of the state of Indiana, residing at Butler, in Dekalb county, Ind., was, and had been, and then remained, the regularly appointed and constituted general agent of the Eel River Railroad Company, upon whom any process issued against it could be served, and with like effect as if the service had been on the president or directors of said company. An alias summons for the Eel River Railroad Company was then issued to the sheriff of Dekalb county, who made return thereto, showing that he had served the same on the

Eel River R. Co. v. State *ex rel.* Kistler

said Eel River Railroad Company by reading it to William V. Troutman, the general agent of the said company, there being no chief officer or other higher officer of the said corporation found in said Dekalb county, and by delivering to the said Troutman, as such general agent, a copy of the writ. The motion of the Eel River Railroad Company to strike out the order for publication was overruled, and proof of publication of a notice to that company to appear to and answer the information was duly made. An amendment information having been filed by the plaintiff below, the Eel River Railroad Company filed its answer in abatement, properly verified, denying the jurisdiction of the Cass circuit court over its person. To this plea the plaintiff below replied in two paragraphs, the first being special in its character, and the second a denial of the matters stated in the plea. At this stage of the proceedings the Wabash Railroad Company also filed an answer in abatement. Upon the application of the Eel River Railroad Company, the venue was changed to Howard county, and the cause was transferred to the Howard circuit court. On motion of the plaintiff below the answer of the Wabash Railroad Company in abatement was stricken from the files for the reason that it was filed too late, and after divers steps in the cause taken by that defendant. A demurrer to the first paragraph of the reply to the answer of the Eel River Railroad Company in abatement was filed, but the record fails to show what disposition was made of it. We must presume that it was overruled. The issues upon the plea in abatement filed by the Eel River Railroad Company were submitted to a jury for trial, and at the request of both the parties the jury were directed to return a special verdict in the form of answers to interrogatories framed under the direction of the court. On the return of the special verdict the Eel River Railroad Company moved for judgment in its favor, and its motion was overruled. A motion by the Eel River Railroad Company for a new trial was also made and overruled. Judgment was thereupon entered in favor of the plaintiff

Eel River R. Co. v. State *ex rel.* Kistler

upon the issues tried. At this point the cause was, for some reason not disclosed by the record, but without objection by any of the parties, transferred to the Howard superior court. After the removal of the cause to the Howard superior court, a motion was made by the Eel River Railroad Company to dismiss the action for the want of a proper relator. Pending this motion, George S. Kistler, who had been re-elected prosecuting attorney for the judicial circuit composed of the county of Cass, was substituted as the relator, and the motion to dismiss was overruled. Each defendant filed a demurrer to the amended information, and these demurrers were overruled. The Eel River Railroad Company answered in four paragraphs, and the Wabash Railroad Company filed its separate answer. The record fails to show that any reply was filed to the answer of either defendant. The cause was tried by a jury, and a general verdict was returned for appellee, with answers to numerous interrogatories filed by the parties respectively. A motion by the appellants for an order requiring the jury to answer the fifteenth and sixteenth interrogatories was overruled. Separate motions by the appellants for a new trial and for judgment on the answers to the interrogatories were made and overruled. Motions by the Eel River Railroad Company for a *venire de novo* and in arrest were overruled. Appellee moved for the appointment of a receiver, and the motion was sustained. Judgment was rendered upon the verdict that the franchises of the Eel River Railroad Company be, and that the same were, forever forfeited and annulled; that the Wabash Railroad Company was unlawfully in the possession of the corporate property of the Eel River Railroad Company, and that it was unlawfully exercising the franchises of that company; that the Eel River Railroad Company, and the Wabash Railroad Company, and each of them, be ousted and excluded from the said Eel River Railroad, its powers, franchises, property, and corporate rights, and from the possession and enjoyment of the same; and that the Eel River Railroad Company be dis-

Eel River R. Co. v. State *ex rel.* Kistler

solved. It was further adjudged that a receiver be appointed to take possession of the said Eel River Railroad Company, its railroad, property, and franchises, to receive the assets of the said company, and to sell and dispose of the same under the orders of the court, and in accordance with the law in such cases. A receiver was appointed by the court, and the person so appointed gave bond and qualified. The judgment defined the specific powers and duties of the receiver. He was authorized to seize and take possession of all the property of the Eel River Railroad Company, including its railroad, rolling stock, books, papers, etc., and to hold the same subject to the further orders of the court. He was empowered to bring all necessary suits in his own name, as such receiver, for the recovery of the property, assets, rights, and franchises of the Eel River Railroad Company, and for the preservation of the same; and the Eel River Railroad Company and the Wabash Railroad Company were ordered to deliver to the receiver all the property of the Eel River Railroad Company in their possession, or under their control, or in the possession or under the control of either of them. Motions to modify the judgment were made by the appellants, and were overruled.

The errors assigned and discussed upon this appeal are the following: (1) The court erred in striking out the answer in abatement of the Wabash Railroad Company. (2) The court erred in overruling the motion of the Eel River Railroad Company for judgment in its favor on the special verdict returned on the issue upon its answer in abatement. (3) The court erred in overruling appellants' several demurrers to the amended information. (4) The court erred in overruling appellants' motions for judgment on the special findings of the jury. (5) The court erred in overruling appellants' separate motions for a new trial. (6) The court erred in appointing a receiver. (7) The court erred in refusing to modify the judgment. The supposed errors so assigned will be considered in their order.

1. Did the court err in striking out the answer of the



Eel River R. Co. v. State *ex rel.* Kistler

Wabash Railroad Company in abatement of the action? Pleas in abatement of the writ or action being dilatory, and tendering no issue as to the merits of the controversy, have always been regarded by the courts with some degree of disfavor, and the rules governing them enforced with much strictness. In all transitory actions objections to the jurisdiction of the court over the person of the defendant may be waived, and, unless such objections are made promptly, and without delay, a waiver will be presumed. A full appearance to the action for any purpose other than to present such objection by way of motion or plea operates as a waiver of the objection, and confirms the jurisdiction of the court over the defendant. Jurisdiction of the person, once lawfully acquired, continues through all subsequent proceedings in the cause. Chit. Pl. 457; Stephens, Pl. (9th Am. Ed.) 352; Gould, Pl. (2d Ed. 1899) 40; Burns' Rev. St. 1894, § 368 (Rev. St. 1881, § 365); Watts v. Sweeney, 127 Ind. 116, 26 N. E. 680; Newell v. Gatling, 7 Ind. 147; Brink v. Reid, 122 Ind. 257, 23 N. E. 770; Ford v. Ford, 110 Ind. 89, 10 N. E. 648; Sunier v. Miller, 105 Ind. 393, 4 N. E. 867; Gilbert v. Hall, 115 Ind. 549, 18 N. E. 28; Slaughter v. Hollowell, 90 Ind. 286; Railway Co. v. Lash, 103 Ind. 80, 2 N. E. 250; Singleton v. O'Brien, 125 Ind. 151, 25 N. E. 154; Black v. Thomson, 107 Ind. 162, 7 N. E. 184; Kinser v. De Witt, 7 Ind. App. 597, 34 N. E. 1014; Keiser v. Yandes, 45 Ind. 174; Needham v. Wright, 140 Ind. 190, 39 N. E. 510; Collins v. Nichols, 7 Ind. 447; Kelley v. State, 53 Ind. 311; Ward v. State, 48 Ind. 289; Railway Co. v. Ott, 11 Ind. App. 564, 38 N. E. 842, 39 N. E. 529. The Wabash Railroad Company was regularly served with a summons requiring it to appear in the Cass circuit court on a day named, and on the 7th day of June, 1893, by its attorneys, that company entered full appearance to the action. On the 12th day of June, 1893, it applied for a change of venue, and its motion was sustained. October 11, 1893, it filed a motion to strike out parts of the complaint. October 12, 1893, it demurred

Jurisdiction—  
Waiver.

Eel River R. Co. *v.* State *ex rel.* Kistler

to the complaint. February 6, 1894, it filed its separate answer in bar. Other steps were subsequently taken by the Wabash Railroad Company, but it is not necessary to set them out. On May 1, 1896,—nearly three years after it had entered its full appearance in the cause,—the Wabash Railroad Company filed its answer in abatement, then for the first time calling in question the jurisdiction of the court over its person. It is entirely clear that this objection was not available to the Wabash Railroad Company when made. After a full appearance, the filing of divers motions and a plea in bar, this appellant must be conclusively presumed to have waived any objection to the jurisdiction of the court, and to have fully submitted itself to that jurisdiction. The reversal of the judgment of the Fulton circuit court on the ground that the Cass circuit court had not jurisdiction of the person of its co-defendant, the Eel River Railroad Company, thereby vacating the proceedings of the Fulton circuit court, did not, in our opinion, relieve the Wabash Railroad Company from the legal effect of the steps taken by it in the cause. On that appeal no question was made or decided as to the jurisdiction of the court over the Wabash Railroad Company. It is also to be observed that the full appearance of this appellant was made in the Cass circuit court, and its application for a change of venue from that county took place prior to the removal of the cause to Fulton county, and long before the proceedings in the Fulton circuit court which were vacated by the reversal of the judgment. These facts, in connection with the long delay in interposing the objection, under the settled rules of pleading and practice wholly disabled the Wabash Railroad Company to assert a want of jurisdiction of the Cass circuit court over its person, and consequently the court did right in striking from the files its answer in abatement. *Brink v. Reid*, 122 Ind. 257, 23 N. E. 770; *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680.

2. Was the Eel River Railroad Company entitled to a judgment in its favor upon the special verdict upon the issue

Eel River R. Co. v. State *ex rel.* Kistler

made by its answer in abatement and the reply thereto?

The determination of this question depends upon the facts found as to the legal residence or domicile of the Eel River Railroad Company at the time of the commencement of the suit, the capacity of the supposed agent and representative of that corporation on whom the summons was served to receive and be subject to service of process on behalf of the corporation, and the place and manner of the service of the writ. The material parts of the special verdict were as follows: The Detroit, Eel River & Illinois Railroad Company was a corporation organized under the laws of this state to build and operate a railroad from Logansport, in Cass county, Ind., eastward through the counties of Cass, Miami, Wabash, Kosciusko, Whitley, Allen, Noble, and Dekalb, and it was so constructed. The railroad and other property of the Detroit, Eel River & Illinois Railroad Company was afterwards sold under a decree of foreclosure rendered by the Cass circuit court. In 1877 a new corporation, known as the Eel River Railroad Company, was organized under the laws of the state of Indiana, for the purpose of purchasing the railroad and other property of the Detroit, Eel River & Illinois Railroad Company, and the corporation so organized, after acquiring the said railroad property, operated the railroad so purchased until the fall of 1887. The road was equipped with rolling stock and machine shops. The general offices and general shops of the Detroit, Eel River & Illinois Railroad Company, and of its successor, the Eel River Railroad Company, were located at Logansport, Cass county, the western terminus of said railroad, and not elsewhere. In the fall of 1879 the Eel River Railroad Company, by contract with the predecessor of the Wabash Railroad Company, surrendered the possession of its road, rolling stock, and equipment to the said Wabash Railroad Company, discharged all of its agents and employees in the state of Indiana, and by the order of its board of directors removed its general offices, books, papers, and other documents from Logansport, Cass

Forfeiture—Quo  
Warranto—Juris-  
diction—Service  
of Process.

Eel River R. Co. v. State *ex rel.* Kistler

county, Ind., to the city of Detroit, in the state of Michigan, from whence they were afterwards removed to Boston, Mass. The Eel River Railroad Company has had no office, officer, or employee, except William V. Troutman, in the state of Indiana, since said contract and surrender in 1879. On October 6, 1887, the Eel River Railroad Company entered into a lease with the Wabash Western Railway Company, of the state of Missouri, whereby the former company leased to the latter in perpetuity its railroad property, including rolling stock, equipment, and franchises. The Wabash Western Railway Company afterwards consolidated with certain other railroads in Illinois, Indiana, and Ohio under the name of the Wabash Railroad Company, and the said Wabash Western Railway Company, and its successor, the Wabash Railroad Company, have been in the absolute possession and control of the Eel River Railroad, its rolling stock, equipment, and franchises, and have been operating said road, since October 6, 1887. The Eel River Railroad Company has done no business or corporate act as a railroad company in the management and control of its property in the state of Indiana since the fall of 1880, except to hold annual meetings of the stockholders at Butler, in Dekalb county. At these meetings nothing was done further than to re-elect directors, and at the meeting of November 7, 1888, to ratify the said lease of October 6, 1887. Since October 6, 1887, the Eel River Railroad Company has done nothing more than to maintain its corporate existence for the purpose of collecting the rentals reserved in the said lease of October 6, 1887, and distributing the same to its stockholders. The last general offices of the Eel River Railroad Company prior to 1880 were at Logansport, Cass County, Ind., and since that date it has had no office in this state. Previously to February 27, 1896, and since the removal of its general offices from Logansport, Ind., the Eel River Railroad Company had not filed, or caused to be filed, in the clerk's office of any county along the line of its road into which or through which the railroad runs, the appointment of any person as

Eel River R. Co. v. State *ex rel.* Kistler

agent; nor from the date of such removal of its offices to February 22, 1896, had it any officer, director, agent, or representative in the state of Indiana. On February 22, 1896, one William V. Troutman, who was then and there an agent of the Wabash Railroad Company, filed in the office of the clerk of Dekalb county, at Butler, in said county, his appointment as general agent of the Eel River Railroad Company. Said Troutman has ever since remained an agent of the Wabash Railroad Company. He has been paid by that company, and not by the Eel River Railroad Company. He has performed no services for the Eel River Railroad Company. He has no duties as the agent of that company. He has had the possession of no books, papers, or property of that company, and the object of his appointment was to defeat the jurisdiction of the Cass circuit court. There has been no appointment by the said Eel River Railroad Company of any other agent, or of any other agent to receive process, at any time since 1879, in any of the counties into which or through which the Eel River Railroad Company's railroad passes. On the 12th day of February, 1896, a summons for the Eel River Railroad Company in this cause was issued to the sheriff of Cass county by the order of the Cass circuit court, and came to the hands of such sheriff on the 13th day of February, 1896, upon which the said sheriff made return February 13, 1896, as follows: "I hereby certify that I have not served this summons because the within-named Eel River Railroad Company is not found in my bailiwick, and that said corporation, the Eel River Railroad Company, has no officer or person authorized to transact business residing in said Cass county, where said corporation has been located, and has exercised its powers, upon whom process can be served." On the 13th day of April, 1896, by the order of the Cass circuit court, a summons for the defendant the Eel River Railroad Company was issued to the sheriff of Dekalb county, and was duly served on William V. Troutman, as the general agent of that company, April 17, 1896. Writs of summons were also issued to the

Eel River R. Co. v. State *ex rel.* Kistler

sheriffs of Miami, Wabash, Whitley, Kosciusko, Allen, Noble, and Dekalb counties, respectively, on the 12th day of February, 1896, each of which writs was returned with the indorsement, "No officer or agent found of the defendant the Eel River Railroad Company upon whom summons could be served." The Wabash Railroad Company, since 1889, has continuously had and maintained, in the county of Cass, offices and agents for the transaction of its business, and for 20 years it and its predecessors have had 19 miles of railroad running through the county of Cass, in the state of Indiana; and said Wabash Railroad Company, since 1889, continuously has kept and maintained offices in the city of Logansport for use and occupation in the transaction of its business. One Charles G. Newell was the agent of the Wabash Railroad Company in Logansport, Ind., for the transaction of its business at that point, in May, 1893, when the summons in this case for the said Wabash Railroad Company was served upon him. The offices of the Wabash Railroad Company at Peru, Ind., are under the control and direction of the principal office of that company at St. Louis, Mo. At and after May 1, 1893, and down to the time of the filing of the answer in abatement in this action, the Eel River Railroad Company did not at any time have or maintain its principal office or place of business in Cass county, Ind. It did not, during any part of such period, have an agent located at or residing in said Cass county; nor did it, during such period, transact any business in said Cass county, or maintain any office therein. No meeting of its stockholders or directors was held in said Cass county between May 1, 1893, and the date of the filing of the plea in abatement herein. At no time in that interval was the Eel River Railroad Company operated from any office or agency in Cass county. Since 1881 the stockholders' meetings of that company each year for the election of directors and the transaction of other business were held at Butler, Dekalb county, Ind., and from 1881 to 1896 such meetings were convened upon notice published by the secretary in

*Eel River R. Co. v. State ex rel. Kistler*

newspapers in each county where any stockholders resided, and in pursuance of notices forwarded by the secretary, by mail, to every stockholder of the corporation. The change in the place of holding the annual meetings of the stockholders of the Eel River Railroad Company from Logansport, in Cass county, to Butler, in Dekalb county, was made by resolution adopted at the annual stockholders' meeting held at Logansport, November 6, 1880, and thereafter no such meeting was held in Cass county. Annually, since 1880, the stockholders of said Eel River Railroad Company have convened at Butler, Dekalb county, and have elected directors of said company. From May 1, 1893, and from thence continuously to the time of the filing of the answer in abatement, the principal office and place of business of the Wabash Railroad Company in Indiana was at Peru, in Miami county. During this period one Emmet A. Gould was the division superintendent of the Wabash Railroad Company, in charge of all the agents employed, and persons engaged in the operation of any part of said railroad in the state of Indiana, with authority to employ and discharge such employees. All trains on said railroad were moved upon instructions from the office of said division superintendent. The offices of the train dispatcher of said Wabash Railroad Company in Indiana, road master, resident engineer, division superintendent of bridges, and master of transportation were maintained and operated at Peru, in Miami county; and the highest officer of said Wabash Railroad Company located at and residing in Cass county was a local station agent, the said Wabash Railroad being managed from the office of the division superintendent, located at Peru, Miami county.

It is indispensably necessary to the exercise of the supervisory authority of the state over railroad corporations created by it, and owning property and enjoying corporate franchises within its territory, that every such corporation should be regarded as having a domicile or place of residence within the state for the purposes of jurisdiction, litigation affecting

Eel River R. Co. v. State *ex rel.* Kistler

its rights and duties, and the taxation of its personal property. When questions arise touching the location of such domicile or residence, for the purpose of determining the same, resort may be had to those principles which are applied in the case of natural persons. Among the most familiar of these are the rules that every citizen of the state has a residence somewhere within one of the counties of the state, in which alone he can claim certain political and civil rights, and in which he must be sued in transitory actions in which he is the sole resident defendant; that a legal residence once established remains until a new one is acquired; and that a purpose to change such residence, unaccompanied by actual removal or change of abode, does not constitute a change of domicile. *Sears v. City of Boston*, 1 Metc. (Mass.) 250; *Culbertson v. Board*, 52 Ind. 361; *Thomp. Corp.* § 7999; *Bulkley v. Inhabitants of Williamstown*, 3 Gray 495; 5 Am. & Eng. Enc. Law (1st Ed.) 865, and notes; *Jac. Dom.* §§ 81, 82, 91, 93, 104, *et seq.* The visitation of civil corporations is by the government itself, through the medium of the courts of justice, which exercise common-law jurisdiction over all such corporations by writ of *mandamus*, and by information in the nature of *quo warranto*. The state, which creates the corporation has the right at all times to inquire through the courts into abuses of its franchises by a body politic, and, in case of nonuser or misuser, by the same medium to impose the penalty of forfeiture according to the course of the common law, or in pursuance of statutes applicable to such cases. 2 Kent, Comm. 300, 305. It is, therefore, one of the duties which a domestic corporation owes to the state to maintain a place of residence or domicile at which the sovereign may call upon it to show cause why its franchises should not be seized, and the corporation dissolved; and where a disposition is manifested to neglect or evade this obligation, or the management of the corporate business is of such a character as to render the location of such residence doubtful, the courts will not nicely weigh



*Eel River R. Co. v. State ex rel. Kistler*

the evidence when compelled to determine which one of several counties into which or through which the railroad passes is the legal domicile of the corporation. Under such circumstances the corporation should not be permitted to take advantage of the uncertainty created by its own acts, and a very slight preponderance of the evidence should be held sufficient to sustain the jurisdiction of the court over the person of the defendant. The general rule of the statute is that an action shall be commenced in the county where the defendant, or one of the defendants, has his usual place of residence. Burns' Rev. St. 1894, § 314. This rule applies as well to corporations as to natural persons. The statutory exceptions to it authorize the bringing of the suit, under some circumstances, in counties other than that in which the defendant has his or its usual place of residence, but they do not prevent the bringing of the suit in the county of such usual residence. The controlling facts as to the usual place of residence of the Eel River Railroad Company found by the special verdict are that, so long as that corporation held the possession of and operated its railroad, its principal offices and place of business were at Logansport, in Cass county, Ind., the western terminus of its road, and that at no time since the Eel River Railroad Company transferred the use and possession of its railroad to other corporations had it any office for the transaction of its business as a railroad company in any county in the state of Indiana. The place of the principal office of a railroad corporation, where its business is transacted, and where its books and records are kept, is generally considered the residence of such corporation. The fact that after the surrender of the railroad, its property and business, to another railroad company, the annual meetings of the stockholders of the Eel River Railroad Company were held at Butler, in Dekalb county, and that the company, for the purpose of defeating the jurisdiction of the Cass circuit court, after the commencement of this action, maintained a nominal agent there, without an office, without a salary, and without duties except to receive serv-

Eel River R. Co. v. State *ex rel.* Kistler

ice of process, does not, in our opinion, change the effect of the findings of fact as to the location of the principal offices and place of business at Logansport, in Cass county. *Platt v. Railroad Co.*, 26 Conn. 544; *Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569. The appellant the Eel River Railroad Company was a domestic corporation. Its railroad was wholly within the state of Indiana. Yet when this proceeding was instituted it had no office, or officer, agent, or agency in any of the eight counties in which and through which its road was constructed. Writs issued to the sheriffs of all of these counties were returned "Not found" because there was no officer or person in any one of them on whom service could be made. So long as the corporation attempted to carry out the purposes for which it was organized, so long as it engaged in the business of operating its railroad, it maintained its principal offices and place of business at Logansport, in Cass county, and its legal residence was, therefore, in that county. No new residence having been acquired by the company, we think that the residence so established should be held to have continued, and that the action was properly brought in Cass county. The action having been properly brought in that county, the statute expressly authorized service of the summons in any other county in the state where any person authorized to transact business in the name of the corporation, officer, or agent could be found. Burns' Rev. St. 1894, § 318. William V. Troutman having been appointed the agent of the company in Dekalb county "to receive and accept service of process with like effect as if served upon the president and directors of the Eel River Railroad Company," we hold that service of the summons on him in Dekalb county was sufficient and legal service upon the company in the action pending in the Cass circuit court. We conclude, therefore, that the motion of the Eel River Railroad Company for judgment in its favor upon the special finding was properly overruled.

3. Was there error in overruling the demurrers to the

Eel River R. Co. v. State *ex rel.* Kistler

amended information? Omitting the formal commencement, the material facts alleged were the following: That on the 4th day of December, 1877, the Eel River Railroad Company was incorporated under the laws of the state of Indiana, for the purpose of owning, operating, and maintaining a railroad lying wholly within said state, and extending from Logansport, in Cass county, eastward through the counties of Miami, Wabash, Kosciusko, Whitley, Allen, and Noble, to the town of Butler, in Dekalb county in said state, a total length of about 94 miles and formerly known as the Detroit, Eel River & Illinois Railroad Company. That by virtue of such corporation the Eel River Railroad Company was authorized to and did take possession of the said railroad, its property and franchises, and held and operated the same. That at the time said Eel River Railroad Company took possession of said property said railroad was fully constructed, completed, and equipped with 94 miles of main track, with side tracks, switches, depots, stations, round-houses, and machine shops, located at Logansport and Butler, with engines, and cars sufficient to do a large passenger and freight business, and was fully equipped for the accommodation of the public along the line of said railroad. That on or about October 6, 1887, said Eel River Railroad Company executed and delivered to the Wabash Western Railway Company a lease of said Eel River Railroad for a period of 99 years, renewable in like periods, at the option of said lessee, forever. That, in order to keep the public authorities in ignorance of said lease, its terms and conditions, and of the utter abandonment of its corporate duties and functions by the said Eel River Railroad Company, said lease was never recorded in any county in the state of Indiana, but was withheld from the records, and was unknown to the public authorities until just before the institution of this suit. That by the terms of the said lease the Wabash Western Railway Company was given full and exclusive power, right, and authority, to use, manage, and operate said Eel River Railroad, its property, franchises, etc., in the place and stead

Eel River R. Co. v. State *ex rel.* Kistler

of the Eel River Railroad Company, with the exclusive right to collect and receive such tolls as said lessee might, from time to time, establish, and all rents, issues, and profits arising from the possession and operation of the said railroad, etc. That by the said lease the Wabash Western Railway Company covenanted to maintain and operate said railroad at its own expense, as if it were the owner thereof, and to perform all the duties and obligations of the Eel River Railroad Company. That immediately upon the execution of the said lease, and in compliance with the terms thereof, the Eel River Railroad Company voluntarily surrendered the whole of its said railroad property and franchises to said Wabash Western Railway Company, discharged all of its servants, agents, and employees, and finally ceased thereafter to operate said Eel River Railroad, or to exercise the franchises thereof. That the president of the said Eel River Railroad Company, its secretary and treasurer live in Massachusetts, and its directors in Massachusetts, Michigan, and other states, but none of them in the state of Indiana; and that since the execution of the said lease the said Eel River Railroad Company has not had any officer, director, agent, or employee resident in the state of Indiana upon whom process could be served; and that the sole and only business now conducted by the Eel River Railroad Company is the receipt and division of the semiannual rental paid to it under the said lease, which business is conducted in the office of its secretary and treasurer, in the city of Boston. That immediately after the execution of said lease, and by virtue thereof, the said Wabash Western Railway Company took possession of the said Eel River Railroad, etc., and held and kept possession thereof until July, 1888, on or about which time the Wabash Western Railway Company and certain other railroad corporations operating different portions of the Wabash line of railroad became and were consolidated into one new corporation organized under the laws of the state of Indiana, known as the Wabash Railroad Company. That the Wabash Western Railway Company,

Eel River R. Co. v. State *ex rel.* Kistler

the original lessee, was a railroad corporation organized under the laws of Missouri, and owned no railroad in Indiana. That at the time of the execution of the said lease it was a part of the contemplated plan to consolidate several railroad companies in Missouri, Illinois, Indiana, Ohio, and Michigan under the name of the Wabash Railroad Company, and as a part of such plan said lease was executed to said Wabash Western Railway Company, so that said consolidated Company, when formed, might acquire or absorb said Eel River Railroad, a competing line with the main line of the Wabash Railroad Company eastward. That said plan of consolidation was fully carried out, and the Wabash Western Railway Company turned over to the Wabash Railroad Company, and said latter company took possession of all the property, real and personal, and franchises of the Eel River Railroad Company; all of said facts as to such consolidation and the purposes of the said lease being known to the said Eel River Railroad Company. That said Wabash Railroad Company, by virtue of the said lease, and not otherwise, entered upon and took possession of the said railroad and property with the consent of the said Eel River Railroad Company, and has ever since exercised the functions and franchises of said Eel River Railroad Company, and received the tolls and profits thereof, and that it still continues to hold the same without any authority of law. At the time the officers, agents, and employees of the said Eel River Railroad Company left the state of Indiana, the principal offices and shops of the said company were located at Logansport, Cass county, in said state, where its superintendent and general manager resided, and from which point the said road was operated. That since said offices were abandoned said company has performed no corporate acts within the state of Indiana. That before the commencement of this suit attempts were made to hold annual meetings of stockholders of the Eel River Railroad Company at Butler, in Dekalb county, Ind., but that said meetings were void for want of proper notice, and because they were held

Eel River R. Co. *v.* State *ex rel.* Kistler

under orders made by the board of directors in the state of Massachusetts, and not otherwise. That the said Wabash Railroad Company owns and operates a competing line of railroad extending from Kansas City, Mo., and other western points to Toledo, Ohio, whose main line parallels the said Eel River Railroad through its entire length, and whose interests are antagonistic and adverse to the Eel River Railroad Company. That since coming into the possession of the said Eel River Railroad the said Wabash Railroad Company, with the permission of the said Eel River Railroad Company, has used the same to destroy its competition, and as a feeder for its own main line, operating it for the benefit of its own traffic, and dwarfing and ignoring the proper business of the Eel River Railroad Company, and the accommodation of its patrons along its line. That the Wabash Railroad Company, with the consent of the Eel River Railroad Company, has abandoned that portion of its road extending from Logansport to Chili, a distance of 22 miles, has torn up and destroyed the switches and side tracks, permitted its tracks, buildings, and bridges to go to decay, has dismantled and destroyed the roundhouse and machine shops at Logansport, and removed them to Peru, on its own main line, and intends to dismantle and destroy the roundhouse and machine shops at Butler, and to remove them to its own main line. That the said Eel River Railroad was projected and built as a competing line of the Wabash Railroad, and that for the purpose of obtaining such competing line the people along the line of said railroad voted and contributed \$300,000 in aid of its construction. It was further charged that the Wabash Railroad Company holds possession of the Eel River Railroad, its property and franchises, without right; that it has usurped, intruded into, and unlawfully exercised the corporate franchises of said company, and is unlawfully operating said railroad and exercising such franchises. Prayer that the charter and franchises be declared forfeited, that the defendants be ousted from said railroad and franchises, and that a receiver be appointed to

Eel River R. Co. v. State *ex rel.* Kistler

take possession of said railroad, its property, etc., and wind up the affairs of the said Eel River Railroad Company.

The acts and omissions for which a forfeiture of the franchises of the Eel River Railroad Company and a dissolution of that corporation are demanded are these: The execution of a lease to the Wabash Railroad Company for a term of 99 years, with the right of perpetual renewal at the option of the lessee; the surrender and abandonment of the possession and control of its railroad by the Eel River Railroad Company; the closing of all its offices, and the discharge of all its agents and employees; the destruction of twenty-two miles of its railroad from Logansport to Chili, with all the side tracks, switches, and bridges on that part of its line; the dismantling and removal of its roundhouse and machine shops; the total diversion of the railroad from the purpose of its construction as a competing line with the Wabash Western Railway Company and the Wabash Railroad Company, and its conversion into an interrupted, subordinate, and tributary road. It is insisted on behalf of the appellants that the leasing of the railroad was

Railroad Leases—  
Statute.

authorized by the act of March 3, 1865 (Burns' Rev. St. 1894, §§ 5209-5215), but as that act, in terms, applies to intersecting and continuous lines only, it does not sustain the argument of the appellants. It is also contended that the lease and subsequent surrender and abandonment of the control of its railroad by the Eel River Railroad Company were sanctioned by the general legislative policy of the state, but we fail to find in any act of the legislature anything which countenances so complete a departure from the objects for which the Eel River Railroad Company was organized, and for which its railroad was constructed. The phrase "legislative policy" is vague at best, and can seldom be regarded as a substantial basis for important legal rights. In the absence of more definite authority, it cannot be held to sanction deliberate violations of the law, omissions of duty to the public and the state, vast and dangerous extensions of corporate privileges, and

Eel River R. Co. v. State *ex rel.* Kistler

an abandonment of the objects for which the corporation was created. If it were true, as appellants affirm, that the corporation did not impliedly agree with the state that it would operate the railroad with its own employees, and never transfer its franchises or property, still we think it clear that it did impliedly agree that it would not, without the permission of the state, destroy a part of its line of railroad, change its terminal points, and turn over to a rival and competing company the possession, control, and exclusive management of the whole of its corporate property, and the enjoyment of all its corporate franchises. Although incorporated under the act of March 3, 1865, nevertheless it was subject to the general provisions of the laws of this state, as far as it is possible to construe them together, and there is nothing in the act of March 3, 1865, which relieved the Eel River Railroad Company from the ordinary obligations to the state and to the public to which all such corporations are subject. It was not necessary that the information should aver that the delinquent company had done any act in contravention of a prohibitory statute, or of a statute imposing a definite penalty. A forfeiture of corporate existence and franchises may result although no statute in express terms enjoins or prohibits the acts or omissions complained of. While certain specific acts and omissions may, by statute, be made causes of forfeiture of the charter or franchises of corporate bodies, yet it is generally recognized that misuser and nonuser of such franchises, even where the specific offenses are not particularly defined by statute, are sufficient grounds for proceedings for such forfeiture and dissolution. President, etc., of Bank of Vincennes v. State, 1 Blackf. 267; People v. Kingston & M. Turnpike Road Co., 23 Wend. 193; People v. Directors, etc., of Bristol & R. Turnpike Road, *Id.* 222; Thompson v. People, *Id.* 537; People v. President, etc., of Hillsdale & C. Turnpike Road, *Id.* 254; People v. President, etc., of Bank of Hudson, 6 Cow. 217; State v. Seneca County Bank, 5 Ohio St. 171; St. Louis, & S. C. & M. Co. v.

Corporations—  
Causes of Forfeiture.



*Eel River R. Co. v. State ex rel. Kistler*

Sandoval, C. & M. Co., 116 Ill. 170, 5 N. E. 370; Ward v. Insurance Co., 7 Paige 294; *In re Jackson Marine Ins. Co.*, 4 Sandf. Ch. 559; 5 Thomp. Corp. § 6618; Trustees v. Woodward, 4 Wheat. 518, 4 L. Ed. 629; Mor. Priv. Corp. §§ 1114, 1115; Railroad Co. v. Winans, 17 How. 30; 15 L. Ed. 27; Terrett v. Taylor, 9 Cranch 52, 3 L. Ed. 650; State v. Minnesota Cent. Ry. Co., 36 Minn. 246, 30 N. W. 816; State v. Portland Natural Gas & Oil Co., 153 Ind. 483, 53 N. E. 1089; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Id.*, 118 U. S. 630, 7 Sup. Ct. 24, 30 L. Ed. 284; Board of Com'rs of Tippecanoe Co. v. Lafayette, M. & B. R. Co., 50 Ind. 85; Thomas v. Railroad Co., 101 U. S. 11, 83; Elliott, R. R. §§ 48, 49; State v. Atchison & N. R. Co., 24 Neb. 143, 38 N. W. 43, 2 L. R. A. 564 (s. c. 8 Am. St. Rep. 164, and notes); Elliott, R. R. § 50, note 5. It may be conceded that not every act in excess of corporate capacity will justify a forfeiture, but in the present case a much more serious charge is made. A lease in perpetuity to a competing company; a total surrender of the railroad, its property and franchises; an abandonment of the control and management; the wrecking and destruction of a considerable part of the line of the railroad; the dismantling and removal of roundhouses and machine shops; the closing of all offices and agencies; the discharge of all employees, agents, and officers in this state; the removal of all books and papers relating to the business of the corporation from the state of Indiana; and the management of the affairs of the company by the officers of a competing line of railroad in such manner as to promote the interest of such competing line without regard to the interests or duties of the line so controlled,—constitute a state of facts wholly different in character and legal effect from those acts in excess of corporate capacity which have been held insufficient to authorize a forfeiture.

It is further said by counsel for appellants that the lease was not prohibited by law, nor wrongful in itself, and that

Eel River R. Co. v. State *ex rel.* Kistler

the information contains no averment that public injury resulted from the acts complained of. In answer to this it is sufficient to say that the lease to the Railroad Leases—Public Policy. competing company was not authorized by any statute; that its execution and the consequent abandonment of its railroad by the Eel River Railroad Company, were against public policy; and that from the facts averred in the information injury to the public may be conclusively presumed. Elliott, R. R. § 49; Board of Com'rs of Tippecanoe Co. v. Lafayette, M. & B. R. Co., 50 Ind. 85; Railway Co. v. Jarvis, 34 C. C. 639, 92 Fed. 735; Central Trust Co. v. Indiana & L. M. R. Co., 39 C. C. A. 220, 98 Fed. 666. The execution of the lease to the Wabash Railroad Company, and the disability resulting from such lease, rendered the lessor company incapable of Railroad Corporations—Causes of Forfeiture. performing its duties to the state and to the public, and to that extent were violations of its charter, and breaches of the implied conditions upon which its right to exist depended. These facts, in connection with the other grounds of forfeiture alleged in the information, consisting of a total, and apparently final, suspension of the business and functions of the Eel River Railroad Company; the abandonment of all means and agencies by which that business was carried on, and those functions performed; the acquiescence of the company in the destruction of a considerable portion of its railroad and other property; and its attempted migration from the state.—were, as we think, sufficient in law to sustain a judgment of ouster and a dissolution of the corporation.

Objection is made that the action was not brought in the proper county, but, for the reasons already given in this opinion, we think the suit was properly commenced in the Cass circuit court. It is also insisted that, when the venue of the cause was changed from Cass Civil Action—Change of Venue—Parties. county to Howard county, there should have been a change of the relator, and that the prosecuting attorney of the Howard circuit court should have been substituted.

Eel River R. Co. v. State *ex rel.* Kistler

Sandoval, C. & M. Co., 116 Ill. 170, 5 N. E. 37; Insurance Co., 7 Paige 294; *In re* Jackson Mari 4 Sandf. Ch. 559; 5 Thomp. Corp. § 6618; Woodward, 4 Wheat. 518, 4 L. Ed. 629; Mor. §§ 1114, 1115; Railroad Co. v. Winans, 17 How. Ed. 27; Terrett v. Taylor, 9 Cranch 52, 3 L. Ed. v. Minnesota Cent. Ry. Co., 36 Minn. 246, 30 State v. Portland Natural Gas & Oil Co., 153 Ind. E. 1089; Pennsylvania R. Co. v. St. Louis, A. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. U. S. 630, 7 Sup. Ct. 24, 30 L. Ed. 284; Board of Tippecanoe Co. v. Lafayette, M. & B. R. Co., Thomas v. Railroad Co., 101 U. S. 11, 83; Elliot 48, 49; State v. Atchison & N. R. Co., 24 Neb. W. 43, 2 L. R. A. 564 (s. c. 8 Am. St. Rep. 164, Elliott, R. R. § 50, note 5. It may be conceded every act in excess of corporate capacity will justify forfeiture, but in the present case a much more serious act was made. A lease in perpetuity to a competing corporation, a total surrender of the railroad, its property and an abandonment of the control and management, the wrecking and destruction of a considerable part of the railroad; the dismantling and removal of rolling stock and machine shops; the closing of all offices and the discharge of all employees, agents, and conductors in this state; the removal of all books and papers from the business of the corporation from the state of Indiana; and the management of the affairs of the railroad by the officers of a competing line of railroad in such a manner as to promote the interest of such competing line, all these acts in regard to the interests or duties of the line so constituted constitute a state of facts wholly different in character from those legal effect from those acts in excess of corporate capacity which have been held insufficient to authorize a forfeiture.

It is further said by counsel for appellants that the act was not prohibited by law, nor wrongful in itself.

Hel River R. Co. v. State ex rel. Kistler

the information contains no averment that public injury resulted from the acts complained of. In answer to this it is sufficient to say that the lease to the competing company was not authorized by any statute; that its execution and the consequent abandonment of its railroad by the Hel River Railroad Company, were against public policy; and that from the facts averred in the information injury to the public may be conclusively presumed. Elliott, R. R. § 49; Board of Com'rs of Tippecanoe Co. v. Lafayette, M. & B. R. Co., 50 Ind. 85; Railway Co. v. Jarvis, 34 C. C. 639, 92 Fed. 735; Central Trust Co. v. Indiana & L. M. R. Co., 39 C. C. A. 220, 90 Fed. 666. The execution of the lease to the Wabash Railroad Company, and the disability resulting from such lease, rendered the lessor company incapable of performing its duties to the state and to the public, and to that extent were violations of its charter, and breaches of the implied conditions upon which its right to exist depended. These facts, in connection with the other grounds of forfeiture alleged in the information, consisting of a total, and apparently final, suspension of the business and functions of the Hel River Railroad Company; the abandonment of all means and agencies by which that business was carried on, and those functions performed; the acquiescence of the company in the destruction of a considerable portion of its railroad and other property; and its attempted migration from the state,—were, as we think, sufficient in law to sustain a judgment of ouster and a dissolution of the corporation.

Objection is made that the action was not brought in the proper county, but, for the reasons already given in this opinion, we think the suit was properly commenced in the Cass circuit court. It is also insisted that, when the venue of the cause was changed from Cass county to Howard county, there should have been a change of the relator, and that the prosecuting attorney of the Howard circuit court should have been substituted.

I. Kistler

that on the 6th day of the information was given to the Wabash Railroad Company possession of its property, and the Wabash West-ern the special finding of 1879, or at any date previous lease has been entered of like character with its successors, in 1887, by agreement, and it is a substantive violation of the charter of the Hel River Railroad Company to challenge the validity of the franchises of the company and the subsequent action. The information is after the lease was given to the Wabash Railroad Company, the 5. But we think the act, in civil actions, is its right of action. Burns' Rev. St. 142 Ind. 428, 41 N. 17 Pa. St. 360; State v. Huylkill Co. v. Com., misuser of the franchise company constituted a high misdemeanor, 149 Ind. 53 Ind.

Case at Bar.

of fact and a final verdict, and there is no objection for judgment in

the reasons for a new trial we are satisfied that the motion was correct.

*Eel River R. Co. v. State ex rel. Kistler*

Sandoval, C. & M. Co., 116 Ill. 170, 5 N. E. 370; Ward v. Insurance Co., 7 Paige 294; *In re Jackson Marine Ins. Co.*, 4 Sandf. Ch. 559; 5 Thomp. Corp. § 6618; Trustees v. Woodward, 4 Wheat. 518, 4 L. Ed. 629; Mor. Priv. Corp. §§ 1114, 1115; Railroad Co. v. Winans, 17 How. 30; 15 L. Ed. 27; Terrett v. Taylor, 9 Cranch 52, 3 L. Ed. 650; State v. Minnesota Cent. Ry. Co., 36 Minn. 246, 30 N. W. 816; State v. Portland Natural Gas & Oil Co., 153 Ind. 483, 53 N. E. 1089; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Id.*, 118 U. S. 630, 7 Sup. Ct. 24, 30 L. Ed. 284; Board of Com'rs of Tippecanoe Co. v. Lafayette, M. & B. R. Co., 50 Ind. 85; Thomas v. Railroad Co., 101 U. S. 11, 83; Elliott, R. R. §§ 48, 49; State v. Atchison & N. R. Co., 24 Neb. 143, 38 N. W. 43, 2 L. R. A. 564 (s. c. 8 Am. St. Rep. 164, and notes); Elliott, R. R. § 50, note 5. It may be conceded that not every act in excess of corporate capacity will justify a forfeiture, but in the present case a much more serious charge is made. A lease in perpetuity to a competing company; a total surrender of the railroad, its property and franchises; an abandonment of the control and management; the wrecking and destruction of a considerable part of the line of the railroad; the dismantling and removal of roundhouses and machine shops; the closing of all offices and agencies; the discharge of all employees, agents, and officers in this state; the removal of all books and papers relating to the business of the corporation from the state of Indiana; and the management of the affairs of the company by the officers of a competing line of railroad in such manner as to promote the interest of such competing line without regard to the interests or duties of the line so controlled,—constitute a state of facts wholly different in character and legal effect from those acts in excess of corporate capacity which have been held insufficient to authorize a forfeiture.

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Eel River R. Co. v. State *ex rel.* Kistler

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Objection is made that the action was not brought in the proper county, but, for the reasons already given in this opinion, we think the suit was properly commenced in the Cass circuit court. It is also insisted that, when the venue of the cause was changed from Cass county to Howard county, there should have been a change of the relator, and that the prosecuting attorney of the Howard circuit court should have been substituted.

Railroad Leases—  
Public Policy.Railroad Corpora-  
tions—Causes of  
Forfeiture.Civil Action—  
Change of Venue  
—Parties.

Eel River R. Co. v. State *ex rel.* Kistler

We cannot adopt this view. The action was a civil one, and a change of venue did not require a change of parties. Originating, as it did, in Cass county, the prosecuting attorney of that county was the proper relator, and so remained, notwithstanding the removal of the cause from that county. The statute provides that the information may be filed by the prosecuting attorney in the circuit court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court, or other competent authority. Burns' Rev. St. 1894, § 1146. It certainly was not intended that, upon every change of venue, there should be a change of the relator. Counsel for appellants refer us to no authority in support of this position, and we have been able to find none. The analogy to criminal practice and pleading, suggested by counsel for appellants, does not sustain their argument. On a change of venue in a criminal case prosecuted by information, the name of the prosecuting attorney subscribed to the pleading is never changed, nor is any other alteration of the pleading necessary. Whether the prosecuting attorney who filed the information in the nature of a *quo warranto* can be compelled to go out of his district to prosecute the proceeding is another question, and is not before us. *Thompson v. Carr*, 13 Bush 215, therefore, does not apply. Upon the whole information we think it appears that there was a willful misuser and nonuser by the Eel River Railroad Company of its franchises in regard to matters which go to the essence of the contract between the corporation and the state, that the Cass circuit court had jurisdiction of the subject-matter of the action and the persons of the defendants, and that there was no defect of parties. The demurrers of the appellants were properly overruled.

4. Were the appellants entitled to judgment on the special findings of the jury? The findings of fact closely pursued and fully sustained the allegations of the information, and it is not necessary to set them out. Special answers separately filed by the appellants set up the defense that the cause of action did not accrue within 15 years before the commence-

Eel River R. Co. v. State *ex rel.* Kistler

ment of the action. The verdict finds that on the 6th day of October, 1887, the lease mentioned in the information was executed, and that thereupon the Eel River Railroad Company surrendered the absolute control and possession of its railroad, its equipments and franchises, to the Wabash Western Railway Company. Nothing is said in the special finding concerning the execution of a lease in 1879, or at any date other than October 6, 1887. But, if a previous lease has been made, the execution of another instrument of like character by and between the same parties, or their successors, in 1887, may have annulled or merged the former agreement, and it undoubtedly had the effect of a new and substantive violation of the duties and obligations of the Eel River Railroad Company. The state had the right to challenge the validity of this lease, and to demand a forfeiture of the franchises of the corporations on account of its execution and the subsequent proceedings of the two companies under it. The information was filed May 1, 1893, less than six years after the lease was executed, and, as to the Eel River Railroad Company, the action was commenced February 13, 1896. But we think the bar of the statute of limitations does not, in civil actions, apply to the state, nor, as a general rule, is its right of action lost by laches upon the part of its officers. Burns' Rev. St. 1894, § 305; Pennsylvania Co. v. State, 142 Ind. 428, 41 N. E. 937; Com. v. Erie & N. E. R. Co., 27 Pa. St. 360; State v. Halter, 149 Ind. 292, 47 N. E. 665; Schuylkill Co. v. Com., 36 Pa. St. 524. Besides, we think the misuser of the franchises of the Eel River Railroad Company constituted a continuing wrong. Peck v. City of Michigan City, 149 Ind. 670, 49 N. E. 800; Gunder v. Tibbitts, 153 Ind. 591, 55 N. E. 762. The special findings of fact were entirely consistent with the general verdict, and there was no error in overruling appellants' motion for judgment in their favor.

Case at Bar.

5. Upon a careful examination of all the reasons for a new trial discussed by appellants' counsel, we are satisfied that the action of the court in overruling the motion was correct.



## Notes

We think the verdict and the special findings were sustained by sufficient evidence, and were in accordance with the law; that no error was committed in giving or refusing to give instructions; and that the court did not err in refusing to compel the injury to answer interrogatories numbered 15 and 16 filed by appellants. In determining the questions arising upon the decision of the court on the motion for a new trial we do not deem it necessary to take them up in detail, or to extend this opinion by comment upon their merits. The views we have expressed upon the controlling questions in the cause sufficiently indicate our reasons for the rulings upon this branch of the case, and we regard these reasons as decisive of the several points made under this assignment of error.

6. The statute expressly authorized the appointment of a receiver in the event that judgment was rendered against the corporation. The judgment in case of a forfeiture is that the franchise be seized into the hands of the state, and that the corporation be dissolved. 2 Kent, Comm.; President, etc., of Bank of Vincennes *v. State*, 1 Blackf. 267; *Ryan v. Vanlandingham*, 7 Ind. 416. The appointment of a receiver to take possession of the property of the company was necessary, and, in the exercise of its general powers, we think the court was authorized to make such appointment. It was asked for in the information, and no harm could result from the appointment as a part of the proceedings in the cause. Had it not been made until after judgment, the court would doubtless have had the right to make the appointment on the motion of the prosecuting attorney, and without further notice. A correct result having been reached, we do not think the action of the court should be disturbed, or that any reason exists for a modification of its judgment. Judgment affirmed.

Appointment of  
Receiver.

## NOTES.

## RAILROAD FRANCHISES—FORFEITURE.

*Nonuser or Misuser of Franchises—General Rule.*—A misuser or nonuser by a corporation of its franchises constitutes a ground

## Notes

of forfeiture which may be taken advantage of by the state in *quo warranto* proceedings. *Omnibus R. Co. v. Baldwin* (Cal.), 1 Am. & Eng. R. Cas. 316; *Ches. & O. Canal Co. v. Balt. & O. R. R.* (Md.), 4 Gill & J. 1; *Attorney-Genl. v. Erie & Kalamazoo R. Co.* (Mich.), 16 Am. & Eng. R. Cas. 652; *Attorney-Genl. v. Joy* (Mich.), 16 Am. & Eng. R. Cas. 643; *State v. Milwaukee L. S. & W. R. Co.*, 45 Mich. 579; *People v. River Raisin & L. E. R. Co.*, 12 Mich. 389; *Attorney-Genl. v. Mississippi Valley & S. I. R. Co.*, 51 Miss. 602; *People v. Albany & Vt. R. Co.*, 24 N. Y. 261; *Brooklyn Central R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *Attorney-Genl. v. Petersburg & R. R. Co.*, 6 Ire. (N. C.) 456; *State v. Hazelton & L. R. Co.* (Ohio), 14 Am. & Eng. R. Cas. 51; *La Grange & M. R. R. v. Rainey*, 7 Cold. (Tenn.) 420; *Vermont & C. R. Co. v. Vermont Central R. Co.*, 34 Vt. 1; *Baltimore & Ohio R. Co. v. Supervisors*, 3 W. Va. 319; *Attorney-Genl. v. West Wisconsin R. Co.*, 36 Wisc. 466.

**Absence from State.**—An information in the nature of a *quo warranto* showing that the principal office of the defendant company is in New York, that its books and records have always been kept in that city, that none of its principal officers reside in the State, and that by reason of these facts it is impossible to enforce an attachment of shares of its stock in New York. *held*, on demurrer, to show sufficient grounds of forfeiture of its charter at common law and under the statute. *State v. Milwaukee, L. S. & W. R. Co.*, 45 Wis. 579.

**Non-Residence of Officers and Directors.**—The failure of the president or vice president and a majority of the directors of a railroad corporation to reside in Texas after the 19th of June, 1858, as required by the act of 1857, is a good ground of forfeiture of the charter. That the act was passed after the organization of the company, under its charter, does not affect its validity or render it liable to the objection that it is an unconstitutional provision which impairs the obligation of the contract. *State v. Southern Pac. R. Co.*, 24 Tex. 80.

**Failure to Construct Road.**—See *Bywaters v. Paris & Great Northern R. Co.* (Tex.), 38 Am. & Eng. R. Cas. 459; *State v. Madison Street R. Co.* (Wis.), 36 Am. & Eng. R. Cas. 135; *Cincinnati, etc., R. Co. v. Clifford* (Ind.), 33 Am. & Eng. R. Cas. 81; *Hodges v. Baltimore, etc., R. Co.* (Md.), 10 Am. & Eng. R. Cas. 270; *Omnibus R. Co. v. Baldwin* (Cal.), 1 Am. & Eng. R. Cas. 219; *People v. Broadway R. Co.*, 126 N. Y. 29, 48 R. Cas. 692.

But the provisions of a railroad charter, requiring that a certain section of the road shall be completed within a specified time, and that on failure the charter should be null and void, are not of the essence of the contract between the corporation and stockholder. *San Antonio v. Jones*, 28 Tex. 19.

## Notes

And under a provision in a statute that upon failure to build a road within a specified time, all unbuilt portions thereof, "with the properties, rights, and franchises appertaining hereto, shall be absolutely forfeited," the failure to build a branch road causes the forfeiture of the corporative charter only as to such particular branch. *State v. St. Paul & S. C. R. Co.*, 35 Minn. 222, 28 N. W. Rep. 245.

**Failure to Operate Road.**—The duty of a railroad corporation to maintain and operate its road is a public duty, and the chief end and object of its creation and existence, and the condition and consideration upon which it receives its grants and franchises from the state; and the suspension of such duties is a suspension of its lawful business within the meaning of the statute, and a cause for declaring a forfeiture, though the corporation also possess, and continue to exercise, other franchises, subordinate and secondary to its principal franchises and business, unless such forfeiture is waived, or the right to continue to exist as a corporation after such suspension of its business is sanctioned by the state. *State ex rel. v. Minnesota C. R. Co.*, 29 Am. & Eng. R. Cas. 440, 36 Minn. 246, 30 N. W. Rep. 816.

**Transfer and Sale of Property.**—When a railway company violates the constitution of the state by making a transfer and sale of its property and franchises in a manner forbidden by that instrument, and afterwards wilfully persists for a long time in a nonuser of its franchises, a cause for forfeiture of its franchises exists, and nothing contained in the statute indicates an intention of the state to waive its right to forfeiture under such circumstances. *East Line & R. R. Co. v. State*, 40 Am. & Eng. R. Cas. 574, 75 Tex. 434, 12 S. W. Rep. 690.

But a railroad corporation does not necessarily forfeit its charter where, under legislative authority, it conveys its road to another corporation. *State v. St. Paul & S. C. R. Co.*, 35 Minn. 222, 28 N. W. Rep. 245.

**Abandonment of Road.**—An abandonment of the road of a company is a valid ground for declaring its franchises forfeited. *Attorney-Genl. v. West Wisconsin R. Co.*, 36 Wis. 466; *People v. Albany & Vt. R. Co.*, 24 N. Y. 261.

**Failure to Pay Debt of Predecessor.**—Under an act of the legislature a railroad succeeded to the property and franchises of a former company, on condition that it pay certain debts of the former, which was made a condition precedent to the exercise of its charter privileges. *Held*, that a failure to pay a debt might work a forfeiture of the charter, at the suit of the state; but this could not affect the right of an individual to proceed by suit to collect such a debt. *St. Louis, A. & T. H. R. Co. v. Miller*, 43 Ill. 199.

**Must Be Positive and Wilful Act.**—There can be no "abuse or mis-

## Notes

use" of a corporate franchise without a positive act of malfeasance. This, to furnish ground of forfeiture, must be wilful. It must be something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power. *Baltimore v. Connellsville & S. P. R. Co.*, 6 Phila. (Pa.) 190.

In the following cases it was held that there was no forfeiture:

**Suing in Federal Court.**—A Pennsylvania corporation obtained a charter also from Maryland, and then instituted suit in a federal court to test the validity of certain Pennsylvania laws. *Held*, that a federal court sitting in Pennsylvania is not a court of another sovereign, but one of the courts of that state; therefore suing in such court was no breach of duty that the corporation owed to Pennsylvania, and, as a result, no cause for forfeiture of its charter. *Commonwealth ex rel. v. Pittsburg & C. R. Co.*, 58 Pa. St. 26.

**Failure to Pay Stock Subscriptions.**—The fact that the subscribers to the capital stock of a corporation do not, at the time of subscription, pay \$5 on each share subscribed will not invalidate the charter. *Commonwealth v. West Chester R. Co.*, 3 Grant Cas. (Pa.) 200.

**Enforcement.**—Nonuser or misuser of railroad franchises, although causes of forfeiture, do not of themselves bring about this result. It is requisite that the necessary proceedings should be directly instituted, and that a judicial determination should follow declaring that a forfeiture shall take place. *Brooklyn Cent. R. R. v. Brooklyn City R. R.*, 32 Barb. (N. Y.) 358; *La Grange & M. R. R. v. Rainey*, 7 Cold. (Tenn.) 420; *Ches. & O. Canal Co. v. Balt. & O. R. R.*, 4 Gill & J. (Md.) 1; *Baltimore v. Pittsburgh & C. R. Co.*, 1 Abb. (U. S.) 9; *Galveston, H. & S. A. Co. v. State*, 81 Tex. 572, 51 Am. & Eng. R. Cas. 287, 17 S. W. Rep. 67.

The non-performance by a corporation of conditions specified in its charter, in default of which it should forfeit the same, does not, *ipso facto* dissolve the corporation or deprive it of its corporate existence and corporate rights. The corporation is thereby simply exposed to proceedings in behalf of the state to enforce the forfeiture; until the state intervenes a private individual cannot set up the alleged forfeiture in condemnation proceedings instituted by such company. *In re Brooklyn Elevated R. Co.* (N. Y.), 46 Am. & Eng. R. Cas. 251.

It seems that a proper mode for the legislature to institute the necessary preliminary inquiry into the fact of misuse would be to pass a resolution directing that the attorney-general institute the proper proceeding in the courts, to ascertain the fact; and that if, in such proceeding, the charge be found true, the charter be revoked. *Baltimore v. Pittsburgh & C. R. Co.*, 1 Abb. (U. S.) 9.

## Notes

Where a charter is granted with the provision that the legislature may repeal the same upon "misuse or abuse of any of the privileges granted," the legislature is not the sole and exclusive judge of the facts that constitute misuse or abuse. That rests in the courts. *Commonwealth ex rel. v. Pittsburg & C. R. Co.*, 58 Pa. St. 26.

The language used in a charter is that upon the failure of the company to construct its road to S. A. within the prescribed time, "then this charter shall be forfeited." This language neither prescribes nor indicates the manner of forfeiture. In cases where such words are employed the uniform construction is that they prescribe a ground of forfeiture, and that the manner must be by a judicial proceeding instituted for that purpose. *Galveston, H. & S. A. R. Co. v. State*, 51 Am. & Eng. R. Cas. 287, 81 Tex. 572, 17 S. W. Rep. 67.

The fact that a railroad has been sued and declared insolvent, and a receiver appointed, does not justify the court in declaring its charter forfeited, and restraining a further construction of the road, where no proceeding of forfeiture has been taken by the people. *Moran v. Lydecker*, 27 Hun (N. Y.) 582, 11 Abb. N. Cas. 298.

**Forfeitures Declared by Statute.**—While a forfeiture at common law does not operate to divest the title of the owner until, by a proper judgment in a suit instituted for that purpose, the rights of the state have been established, it is otherwise when the forfeiture has been declared by a statute. *Oakland R. Co. v. Oakland B. & F. V. R. Co.*, 45 Cal. 365. It has accordingly been held that a statute which requires railroad companies organized under it to begin construction and expend thereon ten per cent. of its capital within five years, and to finish its road and put it in operation within ten years, from the filing of its articles of association, and which declares that "its corporate existence and powers shall cease," works a forfeiture without the necessity of any judicial decision. *Matter of Brooklyn W. & N. R. Co.*, 72 N. Y. 245. If a franchise is granted to construct a street railroad within a certain time, and it is also provided that "if the provisions of this act are not complied with, then the franchises and privileges herein granted shall utterly cease and be forfeited," a failure to lay the track within the prescribed time forfeits the franchise without the necessity of any suit for that purpose. *Oakland R. Co. v. Oakland B. & F. V. R. Co.*, 45 Cal. 365. A charter which provides that unless a company be organized, and one mile of its road constructed within a specified period, all powers, rights, and franchises "shall be deemed forfeited and determined," effects a forfeiture without the intervention of the court. *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524.

In opposition to the foregoing cases, it has been held, that if the continuance of a charter beyond a fixed time is made dependent upon

## Notes

the performance of a specified condition, the non-performance of the condition is a mere ground of forfeiture, which can only be taken advantage of in *quo warranto* proceedings. *La Grange & M. R. Co. v. Rainey*, 7 Coldw. (Tenn.) 420. It has also been *held*, that a statute which provides that when a railroad company shall for one year suspend its lawful business it "shall be deemed to have forfeited the rights, privileges, and franchises" conferred upon it by the act of incorporation, does not operate a dissolution of the company without any judicial proceeding. *State v. Minnesota Cent. R. Co.* (Minn.), 29 Am. & Eng. R. Cas. 440. And in *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358, it was held that a condition contained in a municipal ordinance consenting to the construction of a street railroad, that the road should be completed in a given time, was a condition subsequent; that the failure to complete the road did not *ipso facto* determine the grant; and that a judicial decision was necessary to deprive the grantee of the franchise.

In *Town of Arcata v. Arcata & M. R. R. Co.*, 92 Cal. 639, it was held, that it is a general rule, applicable to legislative grants of the right to use public lands for a particular purpose, that, where the time within which the grantees are to accept the franchise is not fixed in the grant, the grantees must signify their acceptance by commencing the work within a reasonable time, and by prosecuting the same to completion with ordinary diligence; that if such a rule is applicable to a municipal order granting a right to use a street for a railroad switch for the purpose of loading and unloading and which is a privilege operating to the mutual benefit of the defendant and the public, it does not follow that an action of ejectment by the town would lie, but that in the absence of a statutory provision or municipal ordinance or order declaring a forfeiture for a failure to complete the work within a reasonable time, the right of the company to the use of the street can be terminated only by a judgment of forfeiture in an action commenced directly for that purpose. Citing *U. S. v. Grundy*, 3 Cranch, 351.

Parties—Action to Forfeit Charter for Ultra Vires Acts of Foreign Railroad Company Controlling Stock—Removal to Federal Court.—In *State of South Carolina v. Port Royal & A. R. Co.* (U. C.) 56 Fed. Rep. 333, which was a bill filed by the plaintiff in a state court, which alleged that defendant was chartered by the state; that a competing railroad corporation organized under the laws of an adjoining state had obtained control of the stock of the defendant, and was using its voting power for the purpose of crippling defendant and diverting its business to its own road; that said foreign corporation was engaged in interstate commerce, and had power to purchase and hold stock, but that such

## Notes

holding was *ultra vires* and void, and prayed a forfeiture of the defendant's charter, it was held that a controversy involving the construction of the constitution and laws of the United States was presented, which entitled the defendant to remove the cause to a federal court, and that it was immaterial that the Georgia corporation was not a party to the action.

That which would operate to forfeit a charter granted by the legislature cannot be taken advantage of by a stockholder of the corporation in an action brought against him for the recovery of assessments on his stock. The state alone can claim such forfeiture. *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt. 465.

But while it is the right of the state to enforce a forfeiture, it seems that the fact that a corporation has by non-performance of a condition of its charter forfeited its corporate rights and powers may be asserted by any one whose land or property is sought to be appropriated in answer to the application therefor. *Re Brooklyn, etc., R. Co.*, 72 N. Y. 245 And in Pennsylvania, while corporate franchises cannot be declared lapsed by decree in equity, a corporation claiming to have a franchise will be enjoined from invading individual rights. *Leejee v. Continental Pass. R. Co.*, 10 Phila. 362.

A lessee of part of a railroad company's road is a proper party to an action to vacate its charter. *People v. Albany & Vermont R. Co.*, 77 N. Y. 232.

**Forfeiture Cannot be Taken Advantage of Collaterally.**—It is well settled that a cause of forfeiture must be taken advantage of by the power creating the corporation. That power may waive the broken condition of a compact and is accountable to no one for having done so. When no judicial determination declaring a forfeiture, resulting from the institution of the proper proceedings by the State, has been had, no advantage can be taken in any collateral proceeding of the fact that a cause for forfeiture exists. *State v. Miss., O. & R. R. R.*, 20 Ark. 495; *New York & N. E. R. Co. v. New York, N. H. & H. R. Co.*, 25 Am. & Eng. R. Cas. 215, 52 Conn. 274; *Logan v. Vernon, etc., R. R. Co. (Ind.)*, 14 Am. & Eng. R. Cas. 43; *Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. Ch. 107; *Toledo & A. A. R. Co. v. Johnson*, 49 Mich. 188; *In re N. Y. Elev. R. R.*, 70 N. Y. 327; *Att'y-Gen. v. Petersburg & R. R. R.*, 6 Ired. (N. Car.) 456; *Comm. v. Pitts. & C. R. R.*, 58 Pa. St. 26.

Where a land grant railroad company sues an individual for trespass upon the lands, the defendant cannot raise the question of the company's title on the ground that it had no authority to take the lands. This is a question between the state and the corporation only. *Southern Pac. R. Co. v. Orton*, 6 Sawy. (U. S.) 157.

**Power of Court to Appoint Receiver in Adjudging Forfeiture of Corporate Franchises.**—Under the statutes of Texas the court

## Notes

may, in adjudging forfeiture of a franchise of a railroad company, at the suit of the state, appoint a receiver or make any other order that may be necessary to the enforcement of its judgment, although the state may not be a creditor of the company. *Texas Trunk R. Co. v. State ex rel. Hogg* (Tex., 18 S. W. Rep. 199.

**Waiver by the State.**—The state alone has the right to insist upon a forfeiture for these causes. But its waiver of that right need not be direct, but may arise through plain implication. *Selma R. R. v. Tipton*, 5 Ala. 805; *State v. Miss. R. R.*, 20 Ark. 495; *Un. Br. R. R. v. E. Tenn. & G. R. R.*, 14 Ga. 327; *Laffin & R. P. Co. v. Sinsheimer*, 46 Md. 315; *N. J. South. R. R. v. Long Branch Com'rs*, 10 Vroom (N. J.) 28; *In re N. Y. Elev. Rd.*, 70 N. Y. 327; *Wilmington & M. R. R. v. Saunders*, 3 Jones (N. Car.) 126; *Cleveland & P. R. R. v. Speer*, 56 Pa. St. 325; *Cleveland R. R. v. Erie*, 27 Pa. St. 380; *Conn. R. R. v. Bailey*, 24 Vt. 465; *Vermont & Canada R. R. v. Vermont Cent. R. R.*, 34 Vt. 57.

It has, for example, been decided that the charter of a railroad company cannot be forfeited for a failure to construct its road within a certain specified time fixed by the charter without the institution of a judicial proceeding on behalf of the public to test that question. *Vermont & C. R. Co. v. Vermont Central R. Co. et al.*, 34 Vt. 1. And if the state does not choose to enforce a forfeiture, it is not bound to do so and may recognize the validity of the corporate existence by granting to the company other franchises. *Baltimore & Ohio R. Co. v. Marshall Co.*, 3 West Va. 319.

The four years, at the expiration of which a charter of incorporation becomes by the statute forfeited unless the company be organized and its business commenced within that time, do not run against a corporation observing the statutory requirement within that time after its charter has been amended. The amendment is a legislative waiver of any forfeiture. *Farnsworth v. Lime Rock R. Co.*, 47 Am. & Eng. R. Cas. 54, 83 Me. 440, 22 Atl. Rep. 373.

Where a corporation has forfeited its charter by nonuser, but is still maintaining a *de facto* existence, and the legislature passes an act reviving and continuing in force the charter, if it be silent as to the existing officers, or how others shall be elected, it must be construed as continuing the organization as existing at the time of the passage of the act. *Phillips v. Albany*, 28 Wis. 340, 5 Am. Ry. Rep. 46.

The charter of a railroad provided that it should be null and void if the road was not commenced in five years and completed in ten. *Held*, that this was but a privilege reserved to the state to declare the charter forfeited, which might be waived by subsequent acts extending the time or recognizing the existence of the corporation. *Commonwealth ex rel. v. Council of Pittsburgh*, 41 Pa. St. 278.



State *ex rel.* Railroad, etc., Comm'n v. Minneapolis, etc., R. Co

STATE *ex rel.* RAILROAD & WAREHOUSE COMMISSION

v.

MINNEAPOLIS & ST. L. R. Co. *et al.*

(*Supreme Court of Minnesota, June 13, 1900.*)

**Railroad Commission—Order Fixing Rates—Mandamus to Compel Compliance—Order Not Conclusive.**—On the hearing in the district court upon an application for a writ of *mandamus* to compel a common carrier to obey and comply with an order fixing a tariff of rates made by the state railroad and warehouse commission, the carrier is entitled to an examination of matters of fact, in which evidence *de novo* may be taken. Under the provisions of Gen. St. 1894, § 393, such an order is not conclusive as to the reasonableness of the tariff, in the absence of an appeal therefrom.

**Joint Rates—Constitutionality of Statute.\*—Held**, following *Jacobson v. Railroad Co.*, 13 Am. & Eng. R. Cas., N. S., 228, 74 N. W. 893, 71 Minn. 519, 40 L. R. A. 389, that such part of Laws 1895, c. 91, as authorizes said commission to establish by order joint through rates for the transportation of freight over any two or more connecting lines of railway within this state, and to compel obedience thereto, does not violate any of the constitutional provisions, federal or state.

**Reasonableness of Rates.—Held**, that when estimating the cost of operating a railway per ton of freight per mile of carriage, for the purpose of determining the reasonableness of a tariff of rates fixed by the commission, it is error to take into consideration an amount of the earnings which has been appropriated and paid out as dividends on stock shares of such railway.

**Same.**—When considering the reasonableness of such rates, the commission and the courts are justified in taking into consideration what is known as a "commercial necessity," namely, the application of principles when fixing rates which are forced upon common carriers by various conditions and circumstances, and are in common practice among them,—a business policy which actuates and influences the carriers themselves to disregard a rule of strict comparison

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\*See *Chicago, etc., Ry. Co. v. Tompkins* (C. C.), 12 Am. & Eng. R. Cas., N. S., 228; *notes*, 8 *Id.* 613 *et seq.*; *Hickman v. Missouri, etc., Ry. Co.* (Mo.), 15 *Id.* 375.

State *ex rel.* Railroad, etc., Comm'n *v.* Minneapolis, etc., R. Co

and strict equality as between bulk, or weight, or value, as well as distance of carriage.

**Same—Burden of Proof—Rebuttal.**—Gen. St. 1894, § 392, subd. a, and Laws 1895, c. 91, § 3. subd. c, and *Id.* § 381, subd. c, provide that the tariff of rates made by the commission shall be taken by the courts as *prima facie* evidence that such tariff is equal and reasonable, the burden being on the carrier to show to the contrary. *Held*, on the proofs in this action, whether the rule laid down in *Steener-son v. Railway Co.*, 8 Am. & Eng. R. Cas., N. S., 559, 72 N. W. 713, 69 Minn. 353, as a basis for ascertaining what are reasonable rates, be applied, or the rule, of greater value to defendant carrier, announced in *Smyth v. Ames*, 10 Am. & Eng. R. Cas., N. S., 1, 18 Sup. Ct. 418, 169 U. S. 466, 42 L. Ed. 819, that defendant did not rebut and overcome the *prima facie* character of the tariff in question, which was upon coal in car-load lots.

**Cost of Reproduction of Road.**—Courts cannot assume that the cost of reproduction of a line of railway, or that the present, as compared with the original, cost of construction, is the amount of stock and bonds outstanding, or that it is what the road has cost up to the time of the trial.

(Syllabus by the Court.)

**APPEAL** by railroad from Ramsey county district court.  
*Affirmed.*

*Albert E. Clarke*, for appellant.

*W. B. Douglas*, *Atty. Gen.*, and *C. D. & Thos. D. O'Brien*, for respondent.

**COLLINS, J.** The St. Paul & Duluth Railroad Company operates a line of railroad from Duluth, Minn., to the cities of St. Paul and Minneapolis, Minn. The Minneapolis & St. Louis Railway operates a line of railroad from the cities of St. Paul and Minneapolis to the various points in the state of Minnesota designated in the order of the railroad and warehouse commission which is under consideration in this case. Both of the defendants are fully equipped to conduct the business of common carriers of freight, have complete track connection and transfer facilities at the cities of St. Paul and Minneapolis, and for a long time have been engaged in transporting hard coal in car-load lots without change of cars from Duluth to the points upon the

Case Stated.

State *ex rel.* Railroad, etc., Comm'n *v.* Minneapolis, etc., R. Co

line of the Minneapolis & St. Louis road for a joint through rate, which had been established by the mutual agreement of the defendants, and which had been divided between the defendants according to that agreement. On the 22d day of September, 1898, the railroad and warehouse commission of this state, under a resolution, entered upon the investigation of the reasonableness of said joint rate for hard coal in car-load lots so established by the defendant. The defendants duly appeared and took part in the investigation, and on the 19th day of January, 1899, the railroad and warehouse commission made an order establishing a joint through rate for this commodity in question, known herein as "Schedule B." After the due publication and service of the order, the defendants failed to agree upon a division of the rate ordered by the commission, and the Minneapolis & St. Louis Railroad Company withdrew all tariffs on hard coal in car-load lots which had been established under the agreement with the Duluth road. The railroad and warehouse commission, having cited the defendants to appear, made the order of April 8, 1899, directing how the joint through rate should be divided between the defendants. The orders of the commission were duly promulgated and published as provided by law. No appeal was taken therefrom. Neither of the defendants filed or posted schedules of the new tariff, and the defendant the Minneapolis & St. Louis Railroad Company refused to receive or transport coal under the orders of the commission, and this proceeding was commenced in the district court of Ramsey county to compel the defendants to comply with such orders. After a trial, judgment was entered confirming the orders of the railroad and warehouse commission, and commanding the issuance of a peremptory writ, as demanded in the petition filed in this proceeding. This appeal is from a judgment entered in accordance, and also from an order previously made denying a motion for a new trial made by defendant railway company.

1. We are of opinion that the contention of counsel for the relator board, that the order complained of is conclusive in

State *ex rel.* Railroad, etc., Comm'n v. Minneapolis, etc., R. Co

the absence of appeal therefrom, is without merit. Gen. St. 1894, § 393, provides for an appeal from the commission to the district court, and that "upon such appeal, and upon the hearing of any application by the commission, or by the attorney general, for the enforcement of any order made by the commission, the district court shall have jurisdiction to, and it shall examine the whole matter in controversy, *including matters of fact*, as well as questions of law, and to affirm, modify or reverse such order in whole or in part, as justice may require": and that "the remedies herein provided for shall be in addition to all existing legal remedies." Evidently, more than one remedy is contemplated. No effect would be given to the language we have italicised if it was not intended that in a proceeding like this, to enforce an order made by the commission, there should be just such a trial as there would be if an appeal had been taken from the order. On such appeal, the court will examine matters of fact to ascertain whether there is any evidence reasonably tending to support the disputed findings of fact, taking evidence *de novo*. *Steenerson v. Railway Co.*, 69 Minn. 353, 8 Am. & Eng. R. Cas., N. S., 559, 72 N. W. 713. It may not have been necessary, in view of the amendment (Gen. Laws 1891, c. 106), requiring that notice of a hearing should be given by the commission, that any hearing in the courts should be had on the merits, except on appeal; but that is not the question. It is simply one of statutory construction. It was not incumbent upon the defendant to appeal from the order, that it might have an investigation on the facts.

2. As stated by counsel for the railway company, the substantial questions involved are two. One is the validity of the law pursuant to which the order of the commission was made and the judgment appealed from entered, and the other is the validity and correctness of the action of the court below whereby it affirmed and sustained the said order. The latter question is a very serious one, under any circumstances, and will continue so

Railroad Commission—Order Fixing Rates—Mandamus to Compel Compliance—Order Not Conclusive.

Joint Rates—Constitutionality of Statute.

State *ex rel.* Railroad, etc., Comm'n *v.* Minneapolis, etc., R. Co

to be until we have more definite utterances on the subject from the supreme court of the United States, the tribunal in which the constitutional questions involved must finally be determined.

3. As to the first of those questions, a joint rate for car-load lots of coal, both hard and soft, had been agreed upon between the railway lines affected by the order, and had been put in effect some time prior to any action on the part of the commission, and earnings thereunder were divided between the carriers participating in the transportation. The tariff rate for coal per ton from Duluth to the first station south of Minneapolis (Hopkins), about 9 miles, and on defendant's line of road, was \$1.75. To Norwood, a trifle over 40 miles from Minneapolis, it was \$2.50. It was the same to the stations southerly, 21 in number; the one most southerly being Boyd, 152 miles distant from Minneapolis, or about 112 miles beyond Norwood. That is, the rate agreed upon was the same per ton in car-load lots, whether it was transported to a station 40 miles south of Minneapolis, or to another station 152 miles distant. And of this agreed rate it was stipulated by the railway companies that the carrier from Duluth to Minneapolis should receive \$1 per ton, distance 162 miles. We refer to these figures for the purpose of calling attention to what is evidently a fact, that the defendant was either carrying coal to Boyd at a loss, or was collecting too much tariff per ton on the same article transported to Norwood. We presume that these regulations as to rates were compelled by what one of defendant's witnesses called "commercial conditions" which made them necessary,—not unlike those conditions referred to by the writer in a concurring opinion in *Steenerson v. Railway Co.*, *supra*, which permit or compel a discrimination between places and commodities, where railway officials make schedules of rates for the transportation of passengers and merchandise, and countenanced by the interstate commerce commission as therein noted. It has been held by the highest authority in the land, under a

Reasonableness  
of Rates.

State *ex rel.* Railroad, etc., Comm'n v. Minneapolis, etc., R. Co

provision found in the interstate commerce act, that when connecting carriers voluntarily enter into joint traffic arrangements the joint rate must be reasonable, and may be made so. *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 4 Am. & Eng. R. Cas., N. S., 223, 16 Sup. Ct. 700, 40 L. Ed. 935. But, independently of a previously existing joint arrangement, we see no reason why, under the amendatory act (Gen. Laws 1895, c. 91), the commission cannot lawfully compel a joint arrangement in a case like this. The evidence shows that the location of the Duluth road and the Minneapolis & St. Louis road, their track facilities, equipment, etc., are such that, by operating together under joint traffic agreements, the cost of the service can be greatly lessened. The public has, at least, a right to share in the benefits of this condition. If it is judicious so to do and of public benefit to have joint traffic arrangements in any given case, why should not the public be permitted to compel that such arrangements be made? "If the state is to have any voice, therefore, in the establishment of reasonable rates, it must have a voice in some degree and some manner in the business of the carrier. Where a single carrier is being dealt with, this can be accomplished by determining what the operating expenses ought reasonably to be; the reasonable value of the capital invested; what return, under all the circumstances of the case, would be fair, and then, by adjusting the rate, an economical management is secured. But in a case like the one at bar, where each may plead its inability to make the necessary agreement with the other, the state must have the power to arbitrate between them, and, within proper limitations, compel the acceptance of its award." If the state is powerless to decide as between carriers, we have, as said by counsel for the commission, the following absurdity, namely: "(a) The state may regulate rates; (b) the rate must be reasonable; (c) it must afford the carrier compensation over and above operating expenses; (d) the method of operating and consequent expenses is beyond the state control." But this question has heretofore

State *ex rel.* Railroad, etc., Comm'n v. Minneapolis, etc., R. Co

been considered and disposed of in this state adversely to defendant's contention in *Jacobson v. Railroad Co.*, 71 Minn. 519, 13 Am. & Eng. R. Cas., N. S., 228, 74 N. W. 893, 40 L. R. A. 389, now in the United States supreme court on a writ of error. It was there held that the act of 1895 did not, under the facts of that case, contravene the federal or the state constitution when conferring upon the commission the power to compel the transfer and interchange of loaded cars, and the making of joint rates for through shipments, where the haul was in part on one, and in part on the other, of two connecting roads. There are no facts here which take this case out of the operation of the rule thus established, and we must abide by it as perfectly legitimate, until the federal court declares that an error has been committed. We hold, therefore, that chapter 91, Laws 1895, violates no provision of the state or federal constitution, and under it the railroad and warehouse commission of this state has the power to compel the enforcement of joint through rates between points within this state by the connecting carriers now before us.

4. As to the second and most perplexing of these questions: By Gen. St. 1894, § 381, subd. c, *Id.* § 392, subd. a, and Laws 1895, c. 91, § 3, subd. c, it is enacted and provided that the tariff of rates, fares, charges, or classifications made by the

Same—Burden  
of Proof—Rebut-  
tal.

commission shall be deemed and taken in all courts of this state as *prima facie* evidence that such tariff is equal and reasonable; the burden being on the railway company to show that the rates as fixed are unequal or unreasonable. This burden was on the defendant carrier when it resisted the enforcement of the order in the court below, and continued at every stage of the trial, and in respect to all matters affecting its earning capacity, its fixed charges, its operating expenses, its sources of revenue, and the value of the property itself; and the question is, was the *prima facie* character of the order of the commission swept away and overcome by the evidence, and was it shown by such evidence that the rates established were so unjust and unreasonable as to be confiscatory in

State *ex rel.* Railroad, etc., Comm'n v. Minneapolis, etc.. R. Co

their nature, so that when the order was enforced it operated to destroy defendant's rights of property? Of course, this could be done by fixing a fair and reasonable joint rate for the two companies interested for the transportation of coal to points on defendant's road south of Minneapolis, and then awarding too large a proportion or percentage of the joint earnings to the Duluth and Minneapolis carrier. And this is what is complained of, for the commission gave to the carrier last mentioned \$1 per ton,—exactly what it had received under the voluntary traffic arrangement. The order or tariff of rates made and fixed by the commission being *prima facie* evidence that such rates are equal and reasonable, there is nothing in the claim made by counsel that it was the duty of the court below to make a specific finding as to the cost of transacting the business involved in this litigation. And, if it had been, the proper practice, where findings are not sufficiently specific, is to request that they be made so. *Cummings v. Rogers*, 36 Minn. 317, 30 N. W. 892. That the commission had made the order complained of stood admitted in the defendant's answer herein, and it therefore became necessary for defendant to introduce competent and sufficient evidence at the trial to meet and overcome the *prima facie* case made by the relator. This counsel attempted to do by calling as witnesses several persons engaged in railroading, among them Mr. Nay, who was defendant's auditor. We shall not incumber this opinion with tables of figures as presented by this witness, but will simply say that appellant's capital stock outstanding June 30, 1899, the end of its fiscal year, was \$10,000,000, while its bonded indebtedness was \$17,800,000, the bonds bearing interest ranging from 4 to 7 per cent. per annum, the total interest per year aggregating \$659,540. The total cost of the road up to the date last given was \$23,390,560 15, including all equipment. The gross earnings, interest from investments, interest and exchange from trackage and other rentals for the year,—that is, the total receipts,—were \$2,696,601.31. The total expenditures for the year were \$2,237,939.27, the



State *ex rel.* Railroad, etc., Comm'n *v.* Minneapolis, etc., R. Co

net income being \$458,662.04. The witness testified that, if the whole of this sum had been devoted to the payment of dividends upon capital stock, it would be about  $4\frac{1}{2}$  per cent.; and he also testified that it would not be practicable, in his opinion, to apply every dollar of the net income to the payment of stock dividends. We presume this to be true, but why it is so, and to what use a part of the net income would necessarily be diverted from stock dividends, the witness omitted to state. He was then examined as to the earnings of the various operating divisions on the road, testifying to an actual deficit when compared with operating expenses. He was asked the average cost of operation per ton per mile in the Western division, including all kinds of merchandise, and fixed it at 1.293 cents,—a little over  $1\frac{1}{4}$  cents,—while the revenue returned under the rate fixed by the order would be but .779 of a cent, the net loss being a little over one-half cent per ton per mile. He then took up another division, and on this, according to the figures, the loss in hauling coal in car-load lots would be about 2 cents per mile per ton. The cost of operating other divisions per mile was also shown, and on one was but .704 of a cent per ton per mile. And the average cost per ton per mile for carrying freight on the entire system was given by this witness as 1.112 cents for the year ending June 30, 1899. This included all business, through and local, the latter being estimated at one-fourth of all. While the revenue derived for carrying coal at the rate fixed by the commission, and to the stations named in the order, would be 1.118 cents, this would be but .006 of a cent per ton per mile more than the average cost for all classes of freight on the entire system. Upon the face of these figures, and accepting them as correct for the purpose of deciding this case, it would seem that the rates fixed could not be sustained. But, when we scrutinize the testimony of this witness and other persons upon which defendant relies, we discover that the court below was right when it held that the *prima facie* character of the order had

State *ex rel.* Railroad, etc., Comm'n v. Minneapolis, etc., R. Co

not been overturned by the proofs; for Mr. Nay's estimate as to the expense per mile is clearly wrong. He includes in his estimate of expenses for operation the dividends which were declared upon stock and interest paid upon bonds. He was asked upon cross-examination how he got at the amount of 1.112 cents as the average cost for carrying freight on the entire system, and answered: "I arrived at that by taking the total operating expenses, taxes, interest on bonded debt, dividends on stock, amounts paid for trackage and other rentals, aggregating \$2,532,522.60, and deducted therefrom receipts from interest and exchange, interest on investments, and trackage and other rentals received, amounting to \$196,596.95, leaving a total net cost of \$2,335,925.65. I found that the freight earnings were 74.41 per cent. of the gross earnings, and I took 74.41 per cent. of the net cost, which made \$1,738,162.-28, as chargeable to freight, and by dividing that by the total tons one mile gives 1.112 cents." And when questioned as to his methods when ascertaining the cost per mile of operating each of the divisions before mentioned, and concerning which we have given his figures, his answer was in every instance that he included as operating expenses dividends paid upon stock shares and interest paid, with one exception. Referring to one division (the Southwestern), the questions put to Mr. Nay, and his answers, were as follows: "Q. So that is the estimate you have made. The Southwestern Division gets a credit of fifty per cent. more than the actual earnings on a mileage prorate? A. Yes, sir. Q. And you say you have charged it with no dividend? A. No, sir. Q. On the other divisions you have included the dividend? A. Yes, sir. Q. Now, on what stock has dividends been paid? A. On the first preferred and second preferred. Q. The first preferred stock has been retired, has it not? A. It was retired June 1st. Q. And you have not included it in your capitalizations? A. No, sir. Q. Your statement that there was \$10,000,000 of stock outstanding does not include the first preferred? A. Does not include the first preferred. Q.

State *ex rel.* Railroad, etc., Comm'n v. Minneapolis, etc., R. Co

What was the amount of the first preferred? A. \$2,500,000. Q. What dividends were paid on the second preferred? A. There has been \$180,000 paid on the second preferred. Q. What percentage? A. That would be four and one-half per cent. Q. Four and one-half? A. Yes, sir; two per cent. the first dividend, and two and a half the second." It seems to us very clear that in estimating the operating expenses of a railway stock dividends cannot be included. They are no part of the cost of operation. Nor should they be included, under any of the authorities, when ascertaining the reasonableness of a rate tariff. This is in no manner denying the defendant's right to earn sufficient to pay its operating expenses, interest upon its *bona fide* bonded indebtedness, and a proper dividend upon its lawfully issued stock shares or value of the investment. We must not be understood by this last remark as intimating that defendant's bonded indebtedness and stock shares, as testified to, are not *bona fide* and proper in every respect; for that stands admitted by all parties hereto. We think, taking Mr. Nay's figures only, that it very conclusively appears that if all local freight, of every class and description, was carried at the rates fixed by the commission for coal in car-load lots, the earnings would be ample to meet the operating expenses, interest upon the bonded indebtedness (although upon a part thereof the rate is very high), and a fair rate of interest upon the investment. This is evident from the table prepared by the state expert, Mr. Yapp, from figures submitted by Mr. Nay. We need not specifically allude to these tables, but one shows the total number of tons of hard coal received from Duluth for year ending June 30, 1899; Minneapolis & St. Louis Railroad's proportion of revenue and average rate per ton per mile; also loss of revenue had commissioners' rates been in effect. Had the new rates been in effect that year, the loss of revenue to defendant, according to this table in evidence, and not disputed, would have amounted to less than \$1,500. This is a very slight depreciation of revenue, when we discover that the total earnings on freight on the divisions affected by the

State *ex rel.* Railroad, etc., Comm'n v. Minneapolis, etc., R. Co

order amounted to over \$700,000 for that fiscal year. There is another suggestive thing appearing in one of these tables, also undisputed. The estimated cost per ton per mile for carrying freight on that part of defendant's road lying in this state, and also for the whole line,—figures furnished by defendant,—appears for the years 1890 to 1893, inclusive. The most expensive year of the four (for Minnesota) was 1892. Cost per mile per ton .695 of a cent; that is, less than 7-10 of a cent. For the entire system the expensive year was 1891. Cost per mile per ton .743 of a cent; less than 8-10 of one cent. A suggestion that the rapid increase in cost of operation from 1893 to 1898 needed explanation is hardly necessary. But a part of the explanation was furnished when it appeared that these stock dividends were included in the item of operating expenses.

It appeared from these tables, prepared from figures furnished by defendant corporation, and not contradicted by its witnesses, that on one division the average cost per ton per mile was .907 of a cent, while on the entire system or line it was but .709 of a cent,— a trifle more than 7-10 of a cent; in other words, about 4-10 of a cent less than the commissioners' rate. It should be said, however, at this point, that Mr. Yapp, in making these computations, confined operating expenses to actual expenses, including money paid out for taxes and for rentals. He did not include interest on bonds or dividends on stock. Counsel for defendant claims something for testimony as to rates received by other roads for this class of service, and by comparison asserts that the tariff complained of is too low. This method of ascertaining the reasonableness of the tariff is valueless, because it may be that the other roads are exorbitant in their charges. That another road is receiving, say, \$1 per ton for carrying coal 100 miles, while defendant receives but 75 cents for the same distance, may prove that the other road charges too much, and should be looked after by the commission; but this kind of evidence does not demonstrate that defendant is receiving too

State *ex rel.* Railroad, etc., Comm'n v. Minneapolis, etc., R. Co

little, and that the commission has fixed an unfair and unreasonable tariff of rates on its line.

Another matter may well be referred to, and that is the so-called "commercial necessity," before referred to, namely, the application of principles in fixing rates which are forced

upon carriers by various conditions and situations, and, as said in the Steenerson Case, appear at first glance to amount to discrimination between towns and commodities. As was there stated, this rule is an everyday practice with carriers, and that it is well known and justified in business circles, and is tolerated and approved because of the necessity, cannot be overlooked by the courts, any more than it is by legislatures or by commissioners, or by the carriers themselves, when making schedules of rates for the transportation of either passengers or merchandise. And if this business policy actuates and influences the carriers themselves to disregard a rule of strict comparison and strict equality, as between bulk or weight or values of the various commodities, and to carry one article many more miles for the same money than they do another, although there may be no substantial difference in bulk or weight or otherwise, between these two articles, and this is approved by the public as good business policy under the circumstances, there is no reason why the legislature or the commission should not be actuated, influenced, and governed by the same rule. And there is no reason why the courts should not heed and act upon it when called upon to consider and review an order of the character of the one at bar. This rule has constantly been recognized and acted upon by railroads, and has often been referred to and countenanced by the interstate commerce commission when considering the question of long and short hauls. It is this rule which governs when considering the long haul as against the short, and permits the higher rate per mile for the latter, and it also allows a greater rate to be charged upon certain classes of freight than upon other classes, where there is no material difference in weight, bulk, value, or cost of transportation, and is justified by the

State *ex rel.* Railroad, etc., Comm'n v. Minneapolis, etc., R. Co

same argument. At this trial it appeared from the evidence—and it is a matter of common knowledge—that articles for carriage as freight are classified somewhat arbitrarily by railway companies, and a different rate fixed for the transportation of each class, coal being in a very low rate class. Some articles—wood, for instance—were voluntarily carried in car-load lots for less than coal would be, if the order was complied with, and, if Nay was right in his figures, at less than cost. It also appeared that defendant under the old tariff of rates discriminated between stations on its lines,—that is, its freight mileage was not a uniform rate per mile; the result being that for some stations a lower rate prevailed than for others, the haul being the same as to distance. In view of the fact that freight is classified, that different tariff rates are fixed for each class, and that coal is placed by carriers themselves in the lowest class,—that is, in the class which is usually transported at the lowest rate,—it was, in our opinion, insufficient for defendant to rest its legal duty to overcome the *prima facie* character of the order by simply attempting to show that, if all classes of freight were carried at the rates fixed by the order, the revenue of the defendant road would be insufficient to meet its obligations, and therefore that the rate was unreasonable and confiscatory. The fact is that all classes of freight are not to be carried at this rate, unless defendant chooses to do so. It would seem to follow that defendant did not go far enough in its evidence on this point. Again, recognizing fully the commercial necessity before mentioned, evidence should have been introduced on which a finding could have been based to the effect that there was no class of traffic on defendant's road upon which rates could be made, or actually had been made, and were being collected, which would or had made good the loss of revenue resulting from the order. Nothing of this sort was attempted.

One other suggestion in respect to defendant's failure of proof in rebuttal of the order. The rule laid down in the Steenerson Case for ascertaining and determining whether

State *ex rel.* Railroad, etc., Comm'n v. Minneapolis, etc., R. Co

the rates fixed are reasonable, and not confiscatory, was wholly ignored. Defendant's counsel did show what the road had cost up to June 1, 1899. This included every item of expenditure from the start. Cost of construction, repairs, equipment, additions, and all other items were included. But not a particle of proof was presented as to present value or cost of reproduction. Nor did counsel pay any attention to what has been said by the court of last resort on this particular subject. We quote: "But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders." *Smyth v. Ames*, 169 U. S. 466, 10 Am. & Eng. R. Cas., N. S., 1, 18 Sup. Ct. 418, 42 L. Ed. 819. This is but a reiteration of what had theretofore been said in *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. Ed. 841. Nor do we understand that in the very recent opinion of the same learned court, as announced in January last (*Railway Co. v. Tompkins*, 20 Sup. Ct. 336, Adv. S. U. S. 336, 44 L. Ed. —), there has been any departure or intimation thereof from what had been said in the earlier cases. It was there remarked that the state "court proceeded upon the theory that a comparison of the actual gross receipts of the company from its South Dakota local business with those which it would have received if the rates prescribed by the defendants had been in force was sufficient to determine the questions of the reasonableness of these latter rates, and instituted such comparison with respect to the four years preceding the commencement of this suit. Now, it is obvious that the amount of gross receipts from any business does not, of itself, determine whether such business is profitable or not. The question of expenses incurred in producing those receipts must be always taken into account, and only by striking the balance between the two can it be determined that the busi-

## Atchison, etc., Ry. Co. v. Young

ness is profitable. The gross receipts may be large, but, if the expenses are larger, surely the business is not profitable. It cannot be said that the rates which a legislature prescribes are reasonable if the railroad company charging only those rates finds the necessary expenses of carrying on its business greater than its receipts." It would seem self-evident that, if the gross receipts of a business are less than are the expenses of conducting that business, there is a loss to the party carrying it on, and so the decision was clearly right, but in no manner does it affect the case before us.

Referring again to the rule laid down in the Steenerson Case, and that established in the Smyth Case, it is to be observed that the latter is more liberal, and, if adopted by us for the purposes of this case, defendant should not complain. It is evident that there Cost of Reproduction of Road. was a lack of proof as to the present, as compared with the original, cost of construction, unless, as urged by counsel, we assume that either the amount of stock and bonds outstanding or the construction account represent it. We decline to act on this assumption, and we do not regard the authority cited (*Ames v. Railway Co.* [C. C.], 64 Fed. 177) as so holding. Judgment affirmed.

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ATCHISON, T. & S. F. RY. CO.

v.

YOUNG.

(*Court of Appeals of Indian Territory, Oct. 26, 1899.*)

**Bill of Exceptions—Mistake in Indorsing.**—It appeared from the file mark upon the bill of exceptions that it was filed on the day after the date of the clerk's certificate, but both dates were within the time allowed by the order of the court for filing the bill of exceptions, and the record showed no purpose for a fraudulent dating of the certificate. *Held*, that the bill of exceptions was properly before the appellate court.



Atchison, etc., Ry. Co. v. Young

**Foreclosure of Railroad—Obligations of Receiver—Liability of Purchaser—Burden of Proof.\***—In the absence of a statute to the contrary, the purchaser of a railroad at a foreclosure sale is liable only for the debts and liabilities of the railroad company or its receiver to the extent named in the order of the court directing the sale; and the burden of proving that the order of court makes the purchaser liable for such an obligation is upon the party seeking to enforce it against him.

**APPEAL** by defendant from the United States court for the Southern district of the Indian Territory. *Reversed.*

This suit was commenced on the 31st day of July, 1896, by the appellee, to recover damages from the appellant railway company alleged to have been sustained by him to a certain shipment of live stock, being 27 head of beef steers, shipped by defendant from Purcell, in the Indian Territory, to Kansas City stock yards, in the state of Kansas. At the time of the alleged shipment of the cattle and the damages to them, the Atchison, Topeka & Santa Fe Railway Company was in the hands of receivers, and the contract of shipment was had with them. Thereafter the said railroad and its properties were sold at foreclosure sale, and were purchased by the defendant corporation under the name of the Atchison, Topeka & Santa Fe Railroad Company, against which this suit was brought. The case was tried to a jury, and a verdict rendered for the plaintiff for the sum of \$213.65. A motion for new trial was made and overruled, and an appeal to this court prayed and granted. For the purposes of this case we do not deem it necessary to further state the facts.

*H. E. Asp, John W. Shartel, J. R. Cottingham, and Ledbetter & Bledsoe*, for appellant.

*Dorset Carter and B. D. Davidson*, for appellee.

**CLAYTON, J.** (after stating the facts). It is contended by appellee that the bill of exceptions in this case is not prop-

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\*See note at end of case.

Atchison, etc., Ry. Co. v. Young

erly before us, for the reason that the file mark of the clerk as indorsed upon it shows that it was filed by him on the 24th day of February, 1897, whereas the clerk's certificate is dated February 23, 1897, one day before its filing, as shown by the file mark. Both of these days are within the time allowed by the order of the court in which the bill of exceptions could have been filed. The certificate of the clerk is as follows: "I, Jos. W. Phillips, clerk of the United States court, Southern district of the Indian Territory, do hereby certify that the above and foregoing is a true, full, and complete copy and transcript of the judgment, bill of exceptions, record, and proceedings in a cause lately pending in said court at Purcell, Indian Territory, wherein D. A. Young was plaintiff, and the Atchison, Topeka & Santa Fe Ry. Co. was defendant, as the same appears of record in my office as such clerk," etc. By this certificate of the clerk it is shown that the bill of exceptions was of record on the 23d, and it could not have been of record unless it was on file in his office at the time, and the mere fact that it was not indorsed as having been filed until the next day is not conclusive of the fact that it was not on file at the time of making the certificate. If the day on which the filing is dated had been a day after the time allowed by the order of the court for filing the bill of exceptions, it would have been some evidence of a fraudulent dating of the certificate, but, as both days were within that time, we cannot say that the file mark impeaches the certificate. The record discloses no purpose for which this could have been intentionally done, and therefore we conclude that the bill of exceptions was actually deposited with the clerk on the 23d, but the filing was not indorsed upon it until the 24th, and it was by mistake dated as of that day. The bill of exceptions, therefore, is properly before us.

There were quite a number of exceptions saved at the trial, and assigned as error, one of them being that the court erred in refusing to instruct the jury to return a verdict for the defendant; and, as we view the case, we deem it only nec-

Bill of Exceptions—Mistake in Indorsing.

Atchison, etc., Ry. Co. v. Young

essary to pass upon this single assignment. The question presented for our decision is: Is the appellant, the Atchison, Topeka & Santa Fe Railway Company, liable in this action for damages sustained by the appellee by the negligent handling of the cattle by the receivers of the Atchison, Topeka & Santa Fe Railroad Company? Inasmuch as the defendant company purchased the railroad and the properties of the old company at a foreclosure sale, there being no statute to the contrary, it would be held liable only for the debts and liabilities of the old company to the extent named in the order of the court directing the sale. If the liability sued for in this case were named in the order to be assumed by the purchasing company, this action would lie against it. If it were not so named in the order, there rests on the defendant company no legal obligation to pay it. And the burden of proof lies on the plaintiff to establish this fact, and the order, or a certified copy of it, is the proof which the law requires. In this case the order was not produced at the trial, nor was there any proof offered showing, or tending to show, that this claim was embraced in it; but, on the contrary, it was shown by the testimony of Mr. Cottingham, an attorney for the defendant company, but put on the stand by the plaintiff, that the order did not recite this liability as one to be assumed and paid by the purchaser at the sale. And this was all the proof on this point adduced at the trial. Whether it was competent to establish this fact by this oral testimony is not material here. He was plaintiff's witness. His testimony was not objected to, and it stands alone, unchallenged, as all of the evidence, whether competent or not, on which plaintiff must rely to maintain his cause of action. On the law governing the liability of purchasers of railroads at receivers' sales, etc., Mr. Elliott, in his work on Railroads (section 526), lays down the law as follows: "The purchaser generally takes the property freed from the debts and contracts of the vendor, except so far as his title is made subject thereto by statute, or by the terms of the order of sale;" and

Foreclosure of  
Railroad—Obligations of Receiver  
—Liability of  
Purchaser—Burden of Proof.

## Atchison, etc., Ry. Co. v. Young

he cites in his notes many authorities sustaining the text. In the case of *Hoard v. Railway Co.*, 123 U. S. 225, 8 Sup. Ct. 76, the supreme court of the United States say: "The present defendant, the railway company, is not shown to be under any obligation to perform the covenant of its predecessor, the railroad company, which is set up here as a matter of specific defense. The person who purchased the railroad at the mortgage foreclosure sale did not thereby, under any statute of the state, or any contract of which we are aware, become obliged to pay the debts and perform the obligations of the railroad company." This doctrine of the law is so firmly established by reason and judicial decision that we deem it unnecessary to further cite authorities. But see *Railroad Co. v. Shirley*, 54 Tex. 125; *Brockert v. Railway Co. (Iowa)*, 61 N. W. 405; *Vatable v. Railroad Co.*, 96 N. Y. 49, 17 Am. & Eng. R. Cas. 268; *Railroad Co. v. Griest (Ky.)*, 4 S. W. 323; *Gilman v. Railroad Co.*, 37 Wis. 317; *Cooper v. Corbin*, 105 Ill. 224; *Railroad Co. v. Griffin*, 92 Ind. 487; *Ryan v. Hays*, 62 Tex. 42, 9 Am. & Eng. R. Cas. 443; *Cook v. Railroad Co.*, 43 Mich. 349, 23 Am. & Eng. R. Cas. 501, 5 N. W. 390; *Hammond v. Railroad Co.*, 15 S. C. 10, 11 Am. & Eng. R. Cas. 352; *Railroad Co. v. Orr (Ky.)*, 15 S. W. 8. The fact that the obligation accrued while the railroad was in the hands of a receiver does not alter the case. "Where a judgment is obtained against a railroad company and a receiver of such company after title to the property of the company has passed to a new company under foreclosure proceedings, the new company is not liable for such judgment, though the receiver did not turn over the property and obtain his discharge until after such judgment was rendered, and at the time had in his hands and turned over to the new company money sufficient to pay it." *Brockert v. Railway Co. (Iowa)*, 61 N. W. 405. And if, under the circumstances of that case, a judgment against the receiver is not a binding obligation against the new company, *a fortiori*, an obligation against a receiver not reduced to judgment creates no liability against it. The

Dangerfield v. Atchison, etc., Ry. Co

judgment of the court below is reversed, and the cause remanded, with directions that the case be dismissed at the costs of plaintiff.

SPRINGER, C. J., and THOMAS and TOWNSEND, JJ., concur.

NOTE.

**Purchasers at Foreclosure Sale Not Liable for Debts of Old Company.**—It is, as a general rule, well settled that the purchasers of a railroad under a decree of foreclosure, who reorganize and form a new corporation, are not liable upon any of the debts, contracts, or obligations of the old company: *Hoard v. Chesapeake & O. R. Co.*, 123 U. S. 222, 8 Sup. Ct. Rep. 74; *Vilas v. Milwaukee & Prairie du Chien R. Co.*, 17 Wis. 497; *Wright v. Milwaukee & St. Paul R. Co.*, 25 Wis. 46; *Gilman v. Sheboygan & Fond du Lac R. Co.*, 37 Wis. 317; *Smith v. Chicago & N. W. R. Co.*, 18 Wis. 17; *Stewart's Appeal*, 72 Pa. St. 291; *North Hudson R. Co. v. Booraem*, 28 N. J. Eq. 450; *Hopkins v. St. Paul & Pacific R. Co.*, 2 Dill. 306; *Secombe v. Milwaukee, etc., R. Co.*, 2 Dill. 469; *Sullivan v. Portland & Kennebec R. Co.*, 94 U. S. 806; *Menasha v. Milwaukee & Northern R. Co.*, 52 Wis. 514, 5 Am. & Eng. R. Cas. 300; *Cook v. Detroit, Grand Haven & Milwaukee R. Co.*, 43 Mich. 43, 9 Am. & Eng. R. Cas. 443; *Cooper v. Corbin*, 105 Ill. 224, 13 Am. & Eng. R. Cas. 395.

Purchasers of the property and franchises of a railroad at a foreclosure sale do not thereby become liable for the debts and contracts of the company, in the absence of any law or decree directly making them liable. *Hoard v. Chesapeake & O. R. Co.*, 123 U. S. 222, 8 Sup. Ct. Rep. 74.

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DANGERFIELD

v.

ATCHISON, T. & S. F. RY. CO.

(*Supreme Court of Kansas, June 9, 1900.*)

**Excursion Tickets—Validity of Printed Conditions.\***—Conditions in a round-trip excursion railroad ticket stipulating that it shall be used only by the original purchaser, and requiring him to identify

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\*See notes at end of case.

*Dangerfield v. Atchison, etc., Ry. Co*

himself as such at the point of destination before beginning the return passage, are not unreasonable or invalid.

**Same—Same—Waiver and Estoppel—Ejection.**—D. purchased the return portion of such a ticket from a broker at the point of destination, upon which the conditions named were plainly printed. It had not been signed by the original purchaser, and the broker signed D.'s name on the ticket as though he were the original purchaser, had the signature witnessed, and then delivered it to D., who started on his journey. The first conductor to whom it was presented accepted the ticket for passage, but the second conductor discovered that D. was not entitled to ride upon the ticket, took it up, and D., having refused to pay his fare, was required to leave the train. *Held*, that D., not being the original purchaser, nor having complied with the conditions plainly printed upon the ticket, was not entitled to ride upon the same; that the conditions of the contract were not waived, and the railway company was not estopped to refuse the ticket because the agents of the company to whom it was first presented did not discover the imposition, and when the discovery was made the company had the right to refuse to carry D. further, and, upon his failure to pay his fare, to require him to leave the train.

**Estoppel.**—The general rule is that the conduct of one which had been induced by the misrepresentation or fraud of another cannot be relied upon by the latter as an estoppel.

(Syllabus by the Court.)

**ERROR** by plaintiff from Osage county district court.  
*Affirmed.*

*Waters & Waters*, for plaintiff in error.

*A. A. Hurd, O. J. Wood, W. Littlefield, and Robert C. Heizer*, for defendant in error.

**JOHNSTON, J.** Thomas Dangerfield, contemplating a trip to Europe, and desirous of purchasing transportation from his home at Scranton, Kan., to the city of New York, applied to an agent at Scranton, who wrote to a ticket broker in Topeka, and from him procured the unused portion of an excursion ticket over the Atchison, Topeka & Santa Fe Railway. With this ticket he started on his journey, and the first conductor of the railway company to whom he presented the ticket accepted it for passage from Topeka to Kansas City. There another conductor came upon the train, and when the ticket was presented

Case Stated.

*Dangerfield v. Atchison, etc., Ry. Co*

to him he took it up, refused to allow Dangerfield to ride upon it, and, as the passenger did not pay his fare, he was required to leave the train. For the loss sustained by being compelled to discontinue his journey, and for the disgrace and humiliation of being put off the train, he seeks a recovery from the railway company.

The ticket purchased by Dangerfield from the ticket broker at Topeka had been sold in Chicago at a reduced rate by the Chicago, Rock Island & Pacific Railway Company, and provided for a round-trip ride from Chicago to Topeka over the road of the company issuing it, and a return to Chicago from Topeka over the Atchison, Topeka & Santa Fe Railway. It was sold subject to certain conditions that were plainly written on the face of the ticket, and one among them was that it should be used within limited times, for continuous passage, and only by the original purchaser, who, at the point of destination, and before return passage, was required to identify himself as the original purchaser in a particular way. There was a clause that unless the provisions of the ticket were fully complied with, it should be void. It appears that the original purchaser did not sign the ticket when it was purchased, as the contract seemed to require, and that the ticket broker signed Dangerfield's name to the ticket when the purchase was made, as though he were the original purchaser, and had it witnessed by agents of the railway company in North Topeka. Upon the facts the district court held the ticket to be invalid in the hands of Dangerfield, and that he was not entitled to recover from the railway company.

Limited round-trip tickets, like the one presented by Dangerfield, are in common use throughout the country, and the conditions written upon the face of such tickets, and which constitute the contract between the parties, are not unreasonable or invalid. The ticket itself was notice to Dangerfield that it could only be used by the original purchaser, and that it was invalid in the hands of any one else. He

**Excursion Tickets—Validity of Printed Conditions.**

*Dangerfield v. Atchison, etc., Ry. Co*

knew that he was not the original purchaser, that his name had been signed to it by some one else as though he were the original purchaser, and he knew also that he had never been identified to the agents of the railway company as the original purchaser. The conductor to whom the ticket was first presented did not detect the deception, and raised no question as to the validity of the ticket, but the suspicions of the second conductor were in some way aroused, and upon inquiry he learned from Dangerfield that he was not entitled to ride upon the ticket, and in default of the payment of fare he required him to leave the train. The validity of the contract between the purchaser and the railway company issuing the ticket is conceded, and the plaintiff also conceded that the railway company might have refused the ticket when it was presented to its agents and to the first conductor; but it is contended that, the conductor having accepted it for passage at the outset, and having allowed Dangerfield to start on his journey, the railway company is thereafter estopped to question the validity of the ticket, or to deny his right to be carried upon it. The doctrine of estoppel is not applicable in such cases; and the plaintiff, who was pretending to be the original purchaser, and was, therefore, practicing a deceit upon the other party, is not entitled to invoke the equitable rule in his favor. The general rule is that the conduct of one, which has been induced by the misrepresentation or fraud of another, cannot be relied upon by the latter as an Estoppel. estoppel. Nor can there be any waiver or estoppel without knowledge by the agents of the company of the facts and circumstances under which Dangerfield had procured the ticket. The fact that those to whom the invalid ticket was first presented did not detect the imposition does not preclude a refusal of such ticket by other agents or conductors who subsequently discovered its invalidity. *Bowers v. Railroad Co.*, 158 Pa. St. 302, 27 Atl. 893; *Boylan v. Railroad Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290.

Attention is called to the fact that the original purchaser



## Notes

did not sign the ticket when it was issued, but it is clear that his failure to sign did not eliminate the conditions of the contract. If these were binding upon the company, they were equally binding upon the purchaser, whether signed by him or not.

~~Same—Same—  
Waiver and  
Retoppel—Ejec-  
tion.~~

Neither does the fact that the first company omitted or dispensed with the signing of the ticket affect the right of the second company to insist on the conditions, and it did not make the ticket transferable. *Comer v. Foley* (Ga.), 25 S. E. 671. The ticket was, in fact, not transferable, and *Dangerfield*, not being the original purchaser, had no right to ride upon it. As soon as the agents of the company discovered that the conditions of the contract written on the face of the ticket had been violated, they had the right to refuse to carry the passenger, and, upon his failure to pay fare, to require him to leave the train. *Abram v. Railway Co.*, 83 Tex. 61, 18 S. W. 321; *Moses v. Railroad Co.*, 73 Ga. 356; *Rahilly v. Railway Co.*, 66 Minn. 143, 68 N. W. 853; 1 *Fetter, Carr. Pass.* 382. The judgment of the district court will be affirmed. All the justices concurring.

## NOTES.

**Tickets and Fares—Conditions as to Stamping and Identification—Reasonableness.**—A regulation of a company that a "special excursion ticket" shall not be valid for the return journey unless presented by the original purchaser to the authorized agent of the company, to be stamped on the back, is not unreasonable, and if the passenger does not comply with the condition he has no right to use the ticket for the return journey. *Bowers v. Pittsburgh, Ft. W. & C. R. Co.*, 158 Pa. St. 302, 27 Atl. Rep. 893; *Edwards v. Lake Shore, etc., R. Co.*, 81 Mich. 364, 45 N. W. Rep. 827; *Bethea v. Northeastern*, 26 S. Car. 91, 1 S. E. Rep. 372.

A stipulation in a ticket sold as good for thirty days, that the purchaser shall have himself identified as such at the terminal point of his journey, and that the ticket shall be good fifteen days only after identification, is not illegal or unreasonable, but is binding on the party who thus contracts with the company. *Rawitzky v. Louisville & N. R. Co.*, 31 Am. & Eng. R. Cas. 129, 40 La. Ann. 47, 3 So. Rep. 387.

Notes

So a stipulation that one purchasing a round-trip ticket at a reduced rate shall sign the return coupon on the day of his return in the presence of the ticket agent at the station where he boards the train is not unreasonable. *Louisville, etc., R. Co. v. Wright*, 18 Ind. App. 125, 47 N. E. 491.

The carrier issuing such ticket at a reduced rate has the right to limit the privilege of its use to the purchaser. To secure this right and prevent imposition, identification of the purchaser becomes necessary. The manner of identification may be the subject of contract. *Abram v. Gulf, C. & S. F. R. Co.*, 83 Tex. 61, 18 S. W. Rep. 321.

**Same—Same—Validity.**—Defendant sold to plaintiff an excursion ticket from L. to C. and return. The right to a return passage was conditioned upon the presentation of the ticket to the agent at C., its dating and stamping by him, and the affixing of the signature of plaintiff to a printed statement on the back of the ticket, as evidence that he was the original purchaser. *Held*, that the condition was reasonable, and was a condition precedent to plaintiff's right to such return passage, and the conductor to whom the ticket was presented was not called upon to investigate as to the identity of plaintiff. *Edwards v. Lake Shore & M. S. R. Co.*, 81 Mich. 364, 45 N. W. Rep. 827; *Cloud v. St. Louis, I. M. & S. R. Co.*, 14 Mo. App. 136.

A ticket has the following notice printed in large letters on its face: "Notice to purchaser. Read the above contract carefully—it is important—and take notice that the contract must be stamped at Chicago, Ill., before ticket will be accepted for return trip." *Held*, that the condition was not unreasonable, and that it was the passenger's duty to have informed himself of its existence. *Bowers v. Pittsburgh, Ft. W. & C. R. Co.*, 158 Pa. St. 302, 27 Atl. Rep. 893.

A stipulation in a ticket sold at reduced rates that it shall not be good for the return trip unless the passenger identifies himself to the satisfaction of the company's agent before beginning the return trip, and the ticket is stamped by him, is not unreasonable nor contrary to the policy of the law. *Bethea v. Northeastern R. Co.*, 26 S. Car. 91, 1 S. E. Rep. 372.

**Same—Same—Effect as to Purchaser.**—A round-trip ticket contained a condition that to be good for the return trip it must be restamped by the agent at a certain place named, which was not on the route called for; but it was evident from the whole contract that the restamping was to be done at the terminus before the return trip was commenced, and that the place named was only a misprint. *Held*, that as the holder could not be misled thereby, the provision requiring restamping was not invalidated. *Bethea v. Northeastern R. Co.*, 26 S. Car. 91, 1 S. E. Rep. 372.

## Notes

If the passenger engages to have his ticket stamped by the agent of the company, upon his return trip, and has ample opportunity to do so, but fails, the conductor is justified in declining to accept the unstamped ticket, and to eject the passenger if he refuses to pay fare. *Boylan v. Hot Springs R. Co.*, 132 U. S. 146; *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390.

The purchaser of such a ticket who has failed to comply with its terms cannot, in the absence of evidence of a waiver or of want of opportunity to know its contents when he purchased it, have an action against the railroad because he was ejected from the car of a connecting road for failure to pay his fare. *Cloud v. St. Louis, I. M. & S. R. Co.*, 14 Mo. App. 136.

If a passenger accepts an excursion ticket containing a condition that it cannot be used on return passage unless the manner of identification specified has been complied with, has had opportunity to know its conditions, uses it, and the carrier has resorted to no unfair means or deception, the passenger's assent to the same will be conclusively presumed. It is not necessary for the purchaser to sign the contract. *Abram v. Gulf, C. & S. F. R. Co.*, 83 Tex. 61, 18 S. W. Rep. 321.

Where, upon the sale of a round-trip ticket, a special written contract was made between the passenger and the railway company, and signed by the former, that the ticket should not be good for a return passage unless the holder should identify himself as the original purchaser to the satisfaction of the authorized agent of the railway company at the point of destination, who should officially sign and date in ink and stamp the ticket, and where the consideration for such a contract was expressly stated therein to be the reduced rate at which the ticket was sold, the passenger was not entitled to be transported on the ticket upon his return passage, when he had entirely failed to comply with the above provisions of the contract. *Wenz v. Savannah, F. & W. Ry. Co. (Ga.)*, 15 Am. & Eng. R. Cas., N. S., 844.

When the purchaser of a reduced rate excursion railway ticket, by signing a special contract thereon, agrees with the company issuing the ticket that "it shall not be good for returning passage unless the holder identifies himself \* \* \* as the original purchaser to the satisfaction of" a designated agent of the company in the town or city to which the purchaser is to be transported on his "going passage"; that, when officially signed and stamped by said agent, "this ticket shall then be good for return passage"; and that "the holder will identify himself \* \* \* as the original purchaser of this ticket by writing his name, or by other means, if necessary, when required by conductor or agents,"—it is incumbent upon such

## Notes

purchaser, as a condition precedent to having the ticket so signed and stamped, to furnish such proof of his identity, and of the fact that he was the original purchaser, as would be sufficient to satisfy a reasonable man. Under such a contract the validating agent is entitled to call for other proof of identity than that afforded by the holder's writing his name. *Central of Georgia Ry. Co. v. Cannon* (Ga.), 14 Am. & Eng. R. Cas., N. S., 405; *Southern R. Co. v. Barlow*, 104 Ga. 213.

But it has been held that a provision upon the face of a first-class return-trip ticket, that it will not be valid for the return journey, unless the original purchaser procures it to be stamped by the company's agent at the place from which the return trip is authorized, and before it is begun, forms no part of the contract if the purchaser is not required to and does not subscribe and assent to such condition before or at the time he purchases such ticket. *Lake Shore & M. S. R. Co. v. Mortal* (C. C.), 8 Ohio C. D. 134.

A carrier selling a ticket over its own line and a connecting line, containing a provision that to be good for return the purchaser must identify himself to the agent at the terminal point, will not be absolved from liability for expulsion of the passenger expelled because of such agent's failure to properly certify the identification, although the contract provides that it shall not be liable beyond its own line. *Gulf, C. & S. F. R. Co. v. St. John*, 13 Tex. Civ. App. 257, 35 S. W. 501.

**Same—Same—Waiver of Condition.**—When, by the express conditions of a ticket accepted and signed by a passenger, the right to return upon such ticket is conditional upon its being signed and stamped by the station agent at the terminus of the route, and no agent or employee of the company is authorized to alter, modify, or waive any condition, the action of the baggage master in punching the ticket and checking the passenger's baggage, or that of the brakeman in admitting him to the train, does not estop the company from denying the passenger's right to transportation. *Boylan v. Hot Springs R. Co.*, 40 Am. & Eng. R. Cas. 666, 132 U. S. 146, 10 Sup. Ct. Rep. 50.

If a round-trip ticket provides that it must be stamped and the passenger's signature witnessed for identification before beginning the return trip, the purchaser who fails to comply with such conditions cannot maintain an action against the company because he was ejected from a car on a connecting line for failure to pay his fare, in the absence of evidence of a waiver or want of opportunity to know the contents of such ticket when he purchased it. *Cloud v. St. Louis, I. M. & S. R. Co.*, 14 Mo. App. 136.

## Notes

In such case, where the contract is made by the agent of a connecting road, the waiver of its terms by one of the roads will not bind the others. A conductor is not a general agent of the road authorized to waive the terms of a written contract of carriage. *Cloud v. St. Louis, I. M. & S. R. Co.*, 14 Mo. App. 136.

A contract requiring a passenger to identify himself and have the ticket stamped by an agent at a particular place may be waived by parol. *Taylor v. Seaboard & R. R. Co.*, 34 Am. & Eng. R. Cas. 344, 99 N. Car. 185, 6 Am. St. Rep. 509, 5 S. E. Rep. 750.

To show a waiver of an agreement by a passenger to identify himself, and have his ticket stamped by a particular agent, it is competent to prove that an agent of the carrier, other than that at the station designated in the contract, recognized the ticket by permitting the passenger to identify himself and by stamping it for the return trip. *Taylor v. Seaboard & R. R. Co.*, 34 Am. & Eng. R. Cas. 344, 99 N. Car. 185, 6 Am. St. Rep. 509, 5 S. E. Rep. 750.

The fact that a gateman permitted a passenger to pass through the gate without examining and punching a ticket, and that a conductor of a sleeping car failed to notice that the ticket was unstamped, is not evidence of a waiver of a condition by the company, requiring an excursion ticket to be stamped before the return trip begins. *Bowers v. Pittsburgh, Ft. W. & C. R. Co.*, 158 Pa. St. 302, 27 Atl. Rep. 893.

**Same—Same—Effect of Failure to Comply.**—Where a person has failed to have a return ticket stamped as required by an express condition contained in it, and has absolutely declined to pay fare upon the train, he may be ejected by the conductor, and the fact that the conductor did not inform him of the amount of the fare before ejecting him is immaterial. *Boylan v. Hot Springs R. Co.*, 40 Am. & Eng. R. Cas. 666, 132 U. S. 146, 10 Sup. Ct. Rep. 50; *Edwards v. Lake Shore, etc., R. Co.*, 81 Mich. 364; *Bethea v. Northeastern R. Co.*, 26 S. Car. 91; *Bowers v. Pittsburgh, etc., R. Co.*, 158 Pa. 302; *Russell v. Missouri, etc., R. Co.*, 12 Tex. Civ. App. 627.

**Same—Same—Absence of Agent.**—A round-trip ticket, good over different roads, contained the provisions that the company issuing it would not be liable beyond its own line, and that the ticket must be stamped by an agent before starting on the return trip. Absence of the agent prevented the stamping of the ticket, and the company selling it refused to accept it over its road for the return trip. *Held*, that it was not liable. *Mosher v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cas. 339, 127 U. S. 390, 8 Sup. Ct. Rep. 1324; *affirming* 21 Am. & Eng. R. Cas. 283, 23 Fed. Rep. 326. See also *West-*

## Notes

ern Md. R. Co. v. Stocksdale, 83 Md. 245, 4 Am. & Eng. R. Cas., N. S., 510.

**Same—Same—Refusal of Agent to Stamp.**—Where the failure to comply with the condition necessary to validate the ticket is caused by the company, the passenger is entitled to ride on the ticket. Southern R. Co. v. Barlow, 104 Ga. 213, 4 Am. Neg. Rep. 610, 30 S. E. 732; Northern Pac. R. Co. v. Pauson, 70 Fed. Rep. 585, 17 C. C. A. 287, 30 L. R. A. 730.

Where a passenger holds a round-trip ticket good over different roads which provides that the passenger must identify himself to the satisfaction of the agent of the terminal line and have the ticket stamped by him before beginning the return trip, such agent is made the agent of all the companies, and the initial road is liable only for its own breach of the contract, and the refusal of such agent to stamp the ticket, on the ground that he is not satisfied as to the identity of the holder, is conclusive; and it is error to submit to the jury whether or not the agent was satisfied. *Bethea v. Northeastern R. R. Co.*, 26 S. Car. 91, 1 S. E. Rep. 372.

Where the agent of a company arbitrarily refuses to date and stamp the return coupon of a round-trip ticket though the passenger tendering it furnished sufficient proof of his identity, the passenger may recover for the act of the company's conductor in ejecting him, though such date and stamp are essential to the validity of the ticket. *Morse v. Southern R. Co.*, 102 Ga. 302, 39 S. E. 865.

Plaintiff purchased for his wife a round-trip ticket from D. to S., containing a stipulation that in order for it to be good for the return passage it should be presented by her within a stated time to the agent of defendant company at S., and should be signed and stamped by him. She duly presented the ticket to such agent, who wrongfully refused to sign and stamp it; and when she presented it to defendant's train conductor on the return trip, he refused to honor it, treated her with great rudeness, and as she had not money with her to pay her fare, exacted the deposit of her watch as security for the fare. *Held*, that plaintiff's wife was not a trespasser on defendant's train on the return trip, her contract right of passage not being lost because of the agent's refusal to sign and stamp the ticket, but that such refusal was well pleaded and proved by plaintiff, in connection with the other facts, as germane of his cause of action in damage for the wrongs suffered by his wife. *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. Rep. 1066, 21 S. W. Rep. 781.

## Chesapeake &amp; Ohio Railway Co. v. Howard

## CHESAPEAKE &amp; OHIO RAILWAY COMPANY

v.

HOWARD *et al.**(Supreme Court of the United States, May 21, 1900.)*

**Injury to Passenger—Negligence—Question for Jury.**—It appeared from the evidence that the probable cause of the accident was an imperfect flange on one of the wheels of the sleeping car in which the injured passenger was riding. It did not appear that a careful inspection would not have disclosed the defect. There was evidence tending to show that the train was running at an excessive rate of speed. *Held*, that there was sufficient evidence of negligence to carry the case to the jury.

**Same—Negligence of Employees Performing Ultra Vires Agreement.\***—If a railroad passenger is injured through the negligence of the agents and servants of a company, in the course of their employment in conducting and controlling the train, the company is liable, although they, in running such train, were performing an illegal and *ultra vires* agreement of the company.

**Question for Jury.**—Whether the train upon which plaintiff was riding at the time of the accident was controlled and managed by defendant's agents and servants was a question for the jury.

**ERROR** by defendant to the District of Columbia court of appeals. *Affirmed.*

**Statement by MR. JUSTICE PECKHAM:**

The railroad company seeks by this writ of error to reverse a judgment obtained against it at a trial term of the supreme court of the District of Columbia in favor of defendants in error, which judgment has been affirmed by the court of appeals of the District.

The defendants in error are husband and wife, and the action was brought by them to recover damages alleged to have been sustained by the wife because the car in which she was riding ran off the track while forming part of a train in

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\*See note at end of case.

Chesapeake & Ohio Railway Co. v. Howard

transit from Louisville, Kentucky, to the city of Washington, D. C. The accident occurred during the night of November 16, 1886, at a place called Soldier, in the state of Kentucky, and about 60 miles west of the east line of the state, and while the train was running on the rails of the Elizabethtown, Lexington, & Big Sandy Railroad Company, which was a Kentucky corporation.

The amended declaration of the plaintiffs below alleged that the train on which the wife was a passenger was operated and conducted by the agents of the plaintiff in error, and that the plaintiff in error was managing and operating a line of railway between the cities of Louisville, in the state of Kentucky, and Washington city, in the District of Columbia, and upon said line of railway it was a common carrier of passengers for hire; that on the 18th of November, 1886, the plaintiff, Laura P. Howard, purchased from the agents of the defendant, at the city of Louisville, a ticket entitling her to a passage upon the railway from the city of Louisville to the city of Washington, and the defendant, it was alleged, thereupon became bound to safely carry and transport her from the city of Louisville to the city of Washington, but the defendant did not carry or transport her safely, and that near the town of Soldier, in the state of Kentucky, by the unskillfulness, carelessness, and wrongful neglect and mismanagement of defendants' agents in charge of said train, the sleeping car in which she was riding left the track, and went down an embankment and was demolished, and she was badly wounded and injured, and that by reason of these injuries she suffered great pain, and has been rendered permanently unable to do any business.

The defendant took issue upon these allegations, and the case went to trial. It has been twice tried, and upon the first trial, when all the evidence was in, the court directed a verdict for the defendant on the ground that no liability on its part had been shown for the accident in question. Upon appeal to the court of appeals of the District that court reversed the judgment (11 App. D. C. 300), and granted a new



## Chesapeake &amp; Ohio Railway Co. v. Howard

trial. A retrial was had, and the jury found a verdict in favor of the plaintiff, upon which judgment was entered, and on appeal it has been affirmed by the court of appeals. (14 App. D. C. 262.)

*Mr. Leigh Robinson*, for plaintiff in error.

*Messrs. R. Ross Perry, James Francis Smith, and R. Ross Perry, Jr.*, for defendants in error.

MR. JUSTICE PECKHAM, after stating the above facts, delivered the opinion of the court:

The injuries sustained by Mrs. Howard, as shown by the evidence, are very serious, and undoubtedly permanent. The accident happened at night, the car in which she was sleeping left the rail and went over an embankment about 30 feet high, and was broken to pieces. She was released from the car and taken to a cottage by the wayside, and subsequently was given a berth in a sleeping car and brought to Washington.

On the trial she was sworn as a witness, and testified that the disease was evidently progressing, because she could not sit up as long; that she could not walk any distance; could not ride in the street cars without great suffering; that she suffered in various ways a great deal, in her head and in her spine, and was never free from pain. The suffering in her head was at the base of the brain, and if she wanted to see anything back of her she had to turn her entire body; she could not turn her head either way. She said she had been under the doctor's care most of the time during the past eleven years up to the time of the trial.

Dr. Chrystie, a specialist in spinal diseases, testified on the trial that Mrs. Howard placed herself under his treatment early in 1887, and had been under his treatment ever since. He said that she was suffering from an incurable spinal affection, which was progressive, occasioning great suffering and almost total disability. The witness had contrived, and made for her an apparatus grasping the hip and extending up to the shoulders and giving support in front,

Chesapeake & Ohio Railway Co. v. Howard

which steadies the back as a broken bone would be steadied, and this gives her partial relief, but the disease is located so low down, so much superincumbence of weight above, that it does not give her complete relief. The apparatus is made of steel, and the doctor said should be worn constantly, and she should sleep in it at night. It is necessary for her to wear it every hour for comfort, as well as for protection of her backbone. The disease is progressing slowly, and if it had not been for this spinal assistance, he thought she would have had complete paralysis.

At the time of the accident she was a clerk in the Agricultural Department at Washington, but since that time has been compelled to give up her position, and has been unable to do any work.

The probable cause of the accident, as shown by the evidence given by the plaintiffs, was an imperfect flange on one of the wheels of the sleeping car in which Mrs. Howard was riding. It did not appear that a careful inspection could not have discovered the defect.

Injury to Passenger—Negligence—Question for Jury.

There was evidence also given as to the train being driven at a reckless rate of speed at the time. We think there was sufficient evidence of negligence to carry the case to the jury.

The most important question, that of the liability of the defendant company for the consequences of an accident on the road of another company, arises upon the evidence now to be considered.

In order to sustain their claim the plaintiffs gave evidence showing the following facts: The Elizabethtown, Lexington, & Big Sandy Railroad Company, hereinafter called the Kentucky company, was incorporated by an act of the legislature of Kentucky, approved January 29, 1869, for the purpose of building a railroad from Elizabethtown to a point on the Big Sandy river at or within 20 miles of its mouth, all within the state of Kentucky. By a subsequent act the company was authorized to sell the railroad or lease the same whenever it might be to the interest of the company to do so.

## Chesapeake &amp; Ohio Railway Co. v. Howard

The Big Sandy river is the boundary line between the states of West Virginia and Kentucky.

At this time the Chesapeake & Ohio Railway Company, the plaintiff in error (hereinafter called the Virginia company), or its predecessor, had been incorporated by an act of the legislature of Virginia, and was operating its railroad from Phœbus, a station about a mile east of Fortress Monroe, in Virginia, to Huntington, in the state of West Virginia, and about 8 miles east of the Big Sandy river.

In 1877 the legislature of West Virginia passed an act providing for a terminus for the Chesapeake & Ohio Railway on that river, and for the building of a bridge over it so as to connect with the road of the Kentucky corporation. That corporation had not then built its road east of Mount Sterling, a place some distance west of the river, and on November 12, 1879, the Virginia and Kentucky corporations entered into an agreement, by which the Kentucky corporation was to complete its railroad from Mount Sterling east to the river, and thereby form a connection with the road of the Virginia company, and in consideration thereof the latter company was to complete its road from the station at Huntington to and across the river, and allow the Kentucky corporation the free and undisputed use of its railroad from the westerly bank, and across the river to the depot of the Virginia corporation in the city of Huntington, for the term of five years from the date of the completion of the road as stated.

Pursuant to the agreement this extension from Huntington west to the river was completed early in 1882, and at that time the Kentucky corporation had also completed its road from Mount Sterling east to the river, and had also a running arrangement over the Louisville & Nashville Railroad into the city of Louisville.

During these times Mr. C. P. Huntington was very largely interested, and was the controlling spirit, in a number of railroads situated both east and west of the Mississippi. He had built many new lines and extended many old ones, and had a plan for bringing into practically one management a

Chesapeake & Ohio Railway Co. v. Howard

line of railroad extending from the Atlantic to the Pacific. He was also desirous of organizing into one line his lines east of the Mississippi river, consisting of the Virginia company, the Kentucky company, and the Chesapeake & Ohio and Southwestern Railroad Company.

After the completion of the road of the Virginia company from Huntington to the west side of the river and its connection with the Kentucky corporation at that point, an arrangement was made between the two corporations by which they were operated substantially as a continuous system. They were operated together by one general manager, under verbal directions from Mr. Huntington, who was president of the Virginia company, and owned a controlling amount of the stock of the Kentucky company. Under that arrangement the Virginia company "operated and maintained the line of railroad for and on account of the Elizabethtown, Lexington, & Big Sandy Railroad Company, mostly west of the Big Sandy river, to Lexington, and included in that also the 8 miles of track between the west bank of the river and Huntington.

They operated it for and on account of the Elizabethtown, Lexington, & Big Sandy Railroad Company, keeping an account on the books of the Chesapeake & Ohio Railway Company of all receipts of every character between Lexington and Huntington, including also the Louisville connection." This was in the early part of 1882. The arrangement continued, as testified to by one of the witnesses, who was an officer of the defendant, until the organization of the Newport News & Mississippi Valley Railroad Company (hereinafter spoken of), after which it is said that its officers operated the properties under the leases hereinafter mentioned. (This statement appears to be merely the conclusion of the witness from the other facts in the case.) The duration of the contract or arrangement under which the Virginia and Kentucky roads were operated as a continuous system was to be five years from the date of the completion of the road, which was in the early part of 1882, and that

## Chesapeake &amp; Ohio Railway Co. v. Howard

would have made the arrangement continue until 1887, a period subsequent to the happening of the accident. The witness supposed that the organization of the Newport News & Mississippi Valley Railroad Company terminated the contract by force of the lease above referred to. He stated that it was terminated in the same manner in which it was made, by the direction of Mr. Huntington; that Mr. Huntington directed Mr. Smith, the general manager, to operate the properties in accordance with the leases after they had been made. Mr. Huntington desired to extend, complete, and bring his different railroads under one management, that of himself.

For the purpose of being able the more easily to accomplish this object, Mr. Huntington procured from the legislature of the state of Connecticut an act, approved March 27, 1884, incorporating the Southern Pacific Railroad Company, which was therein authorized and empowered to contract for and acquire, by purchase or otherwise, and buy, hold, own, lease, etc., railroads, railroad bridges, engines, cars, rolling stock, and other railway equipment, etc., in any state or territory; "Provided, however, that said corporation shall not have power to make joint stock with, lease, hold, own, or operate any railroad within the state of Connecticut."

On March 10, 1885, the legislature of Connecticut changed the name of the Southern Pacific Company to that of the Newport News & Mississippi Valley Company, with all the powers and privileges and subject to all the liabilities existing under the former name.

On January 29, 1886, the Kentucky corporation and the Newport News & Mississippi Valley Company (the Connecticut corporation), entered into an agreement of lease, by which the Kentucky corporation leased its road to the Connecticut corporation for 250 years from the 1st day of February, 1886, at a rental of \$5,000 per annum, and on June 15, 1886, the Virginia corporation and the Connecticut corporation also entered into an agreement, by which the railroad of

## Chesapeake &amp; Ohio Railway Co. v. Howard

the former was leased to the latter corporation from July 1, 1886, for 250 years, at a yearly rental of \$5,000.

As Mrs. Howard's injuries were sustained in November, 1886, on the railroad in Kentucky which had been leased to the Connecticut corporation the January previous, the plaintiff in error herein makes the claim that it is not liable for the results of that accident, because it did not occur on its road nor on the road of any company for the negligent acts of whose agents it was responsible.

Assuming that the Kentucky railroad had been leased to the Connecticut corporation, and that the latter was, at the time the accident occurred, actually engaged in the management of the former, and that the train to which the accident happened was conducted and managed by the agents of the Connecticut company, it might then be assumed that this plaintiff in error could not be held responsible for the result of such accident; but the simple fact that at the time when it occurred the lease spoken of was in existence would not conclusively bar a recovery in this case. If, notwithstanding the execution of the lease, the plaintiff in error in fact, through its agents and servants, managed and conducted and controlled the train to which the accident happened, it would be responsible for that accident, notwithstanding the existence of the lease. The evidence was sufficient to show that prior to the execution of the lease the Kentucky corporation was controlled and managed by the plaintiff in error, and it was so controlled and managed by the direction of Mr. Huntington, the president of plaintiff in error. It is claimed that this arrangement was wholly illegal, as beyond the powers of the Virginia corporation. But if, while the Kentucky corporation was managed under such agreement, an accident had occurred by reason of the negligence of the agents and servants of the Virginia Company, it would have been liable for the damages arising therefrom, notwithstanding the agreement or arrangement under which such control was maintained was illegal. If the agents and servants of a corporation

Same—Negligence of Employees Performing Ultra Vires Agreement.

## Chesapeake &amp; Ohio Railway Co. v. Howard

commit a wrong in the course of their employment and while in the performance of an agreement of the corporation which is *ultra vires*, the company is liable for the wrong thus committed, notwithstanding the illegality of the agreement. First Nat. Bank v. Graham, 100 U. S. 699, 702, 25 L. Ed. 750, 751; Salt Lake City v. Hollister, 118 U. S. 256, 260, 30 L. Ed. 176, 177, 6 Sup. Ct. Rep. 1055; Bissell v. Michigan S. & N. I. R. Cos. 22. N. Y. 258; Buffett v. Troy & B. R. Co., 40 N. Y. 168; Nims v. Mount Hermon Boys' School, 160 Mass. 177, 22 L. R. A. 364, 35 N. E. 776; New York, L. E. & W. R. Co. v. Haring, 47 N. J. L. 137, 54 Am. Rep. 123.

We are therefore brought to a consideration of the evidence in the record, tending to show that this train was a train of the plaintiff in error, controlled and managed by its agents and servants, for whose negligence it is liable.

Question for  
Jury.

The circumstances attending and leading up to the arrangement made between the Virginia and Kentucky companies in 1882, by which arrangement the former took upon itself the management of the Kentucky company, have been set forth somewhat in detail in order that such facts might be viewed in connection with the evidence as to the leases and the manner in which the affairs of the roads were thereafter conducted, so that the whole case could be examined to determine whether it was proper to submit to the jury the main question of fact: Who had the management and control of the train to which the accident happened?

Evidence was given that many years prior to the execution of the lease above referred to the Virginia company had established offices and an agency in the city of Washington for the purpose of obtaining business for that company and its connections, and it had entered into some kind of running arrangements with the Virginia Midland Railway Company, whose road extended from the city of Washington through the city of Charlottesville, in the state of Virginia, a station on the line of the Chesapeake & Ohio Company. After the

## Chesapeake &amp; Ohio Railway Co. v. Howard

arrangement between the Virginia and Kentucky companies above mentioned, if not before, the Virginia company sold tickets at Washington through to Louisville, and *vice versa*, and advertised the route in various newspapers throughout the country, especially in Washington and Louisville, in which the route was designated as the Chesapeake & Ohio Railroad, or Route, and it also advertised that it ran through or "solid" trains over this route. Such advertisements were continued after the execution of the lease up to and after the happening of this accident. There is room in the evidence for the inference, which a jury might draw, that the Chesapeake & Ohio Company, by these various facts, and by such advertisements, and by the tickets which it sold, held itself out to the public as a carrier of passengers between the two cities. There was no substantial change in the character either of the advertisements or of the tickets after the execution of the leases.

If the Virginia company did in fact thus hold itself out as a carrier of passengers between the two cities without change of cars and by a solid train, the inference that such train was its own, and that the servants in charge thereof were its servants, might be based upon that fact together with the other evidence in the case, and such inference would be for the jury.

For the sole purpose of organization, and the more readily to enable Mr. Huntington to work out his scheme for one continuous line from the Atlantic to the Pacific, he procured the acts of the Connecticut legislature incorporating the Newport News & Mississippi Valley Railroad Company. The capital stock of the corporation was fixed at \$1,000,000 divided into shares of \$100 each, and the act provided that whenever \$500,000 should be subscribed and 10 per centum of the subscription paid in cash, the stockholders might organize the corporation, which might then proceed to do the business authorized by the act. An affidavit of the secretary of the company attached to the copy of the articles of association, filed in the office of the secretary of state of



## Chesapeake &amp; Ohio Railway Co. v. Howard

West Virginia, showed the acceptance of this charter by the vote of a majority of the corporation and the subscription of \$500,000 to the capital stock on May 10, 1884, and the payment in cash of 10 per centum at the time of such subscriptions. There was no proof of a dollar's worth of the capital stock ever having been issued, although officers of the company seem to have been elected. Mr. Huntington was the president of the corporation, and the officers of the Virginia corporation appear to have been also elected or to have acted as officers of the Connecticut corporation. After the execution of the leases already mentioned there seems to have been no actual change in the *personnel* of the officers of the leased road, nor in the actual management or control thereof. The same hands continued apparently in the same employment. There is no proof of the payment of a single dollar on account of these leases, but nevertheless a formal transfer was alleged to have been made to the lessee of the rolling stock and equipment of the Virginia and Kentucky corporations. The evidence is sufficient to admit the inference that it was a merely formal although possibly valid lease for the purpose of organization, which would render it easier to accomplish the formation of a continuous line, which Mr. Huntington had at heart. The same offices in the city of Washington were retained after the lease as before. The same individuals remained in the same relative positions therein, and substantially the same advertisements and the same kind of tickets were inserted in the newspapers and sold at the offices after as before the execution of the leases. The sign at the Washington office was "Chesapeake & Ohio Railway Ticket Office," at the windows where the tickets were sold and over the doors, and no change was made after the execution of the leases, and after that time, as well as prior thereto, they continued to use the name of the Chesapeake & Ohio Railway and Chesapeake & Ohio Route, and the general passenger agent said that from the time he commenced in 1882 he did not think the sign was ever changed. He was under the impression that the tickets

Chesapeake & Ohio Railway Co. v. Howard

had been changed after the execution of the leases, and that they were then issued in the name of the Newport News & Mississippi Valley Company, but that was a mere impression. The ticket of the plaintiff was issued by the Virginia company, and provided for a passage from Louisville to Washington. She had taken this route to and from Washington several times before, and her ticket, of the same description, had always been honored over the whole length of road between the two cities.

From all these facts it does not necessarily follow as a legal conclusion that the execution of a lease from the Kentucky to the Connecticut corporation changed the status of the former company, and effected in and of itself a change in the operation and management of that company, so that the Virginia company no longer managed or controlled the Kentucky company. The lease might exist, and the Virginia company might still manage the Kentucky company or some particular through train over that road.

Evidence was also given showing that some time after the execution of these leases, and after the happening of the accident, the Virginia company went into the hands of a receiver at the instance of Mr. Huntington, and after it came out the Connecticut corporation went out of existence, and transferred all the property which had come to it from the Virginia company back to that corporation, and during all that period there was actually no change in the manner of conducting the business of the roads other than as a matter of bookkeeping, nor in the persons who filled the offices and did the work of the companies. The Connecticut corporation simply disappeared from view. During the whole period it was the Chesapeake & Ohio Route or the Chesapeake & Ohio Road that was advertised as forming a continuous line from Washington to Louisville and carrying passengers thereon without change of cars and in a solid train.

Coming to the particular case of the defendants in error, the evidence showed that the wife purchased the ticket upon

## Chesapeake &amp; Ohio Railway Co. v. Howard

which she entered the car at Louisville; that it was a ticket headed "Chesapeake & Ohio Railway," and that it stated that it was good for one continuous, first-class passage from Louisville, Kentucky, to Washington, D. C., and was signed by the same person who had theretofore been the general passenger and ticket agent of the Chesapeake & Ohio Railway. The ticket contained a notice that the company acted only as agent in selling for passage over other roads; but we think it plain that a passage over a road or on a train which was controlled or managed by it would not be included in such exception. The ticket was not purchased at the regular ticket office of the company, but from what is termed in the evidence a "scalper," and was the half of a round-trip or excursion ticket from Washington to Louisville and return. When Mrs. Howard came to the station at Louisville for the purpose of commencing her journey she entered the train which was lettered or had a card attached to it signifying that it was the Chesapeake & Ohio train for Washington, and she supposed she was on a train of that company, and after entering the sleeping car she surrendered her ticket to the conductor, and the same was received as a good and sufficient ticket entitling her to transportation from Louisville to Washington. After the accident happened, and while she was on her way to Washington in the train which had been procured for the passengers, she was attended by a doctor, who stated that he was the chief of the corps of surgeons of the Chesapeake & Ohio Railway, and when she told the doctor she was afraid she would lose her position on account of the injury, she testified that the doctor said to her, "The company will see you through," and although he did not say the Chesapeake & Ohio Railway Company, yet from the conversation she had with him she understood that it was that company for which he spoke.

Other evidence was given on this subject which it is not necessary to refer to, and when the judge came to charge the jury he stated upon this point as follows:

"It is not enough, to render the defendant liable or to

## Chesapeake &amp; Ohio Railway Co. v. Howard

justify you in finding that it was operating the road, to find that it sold tickets over it. If the defendant simply sold a through ticket from Louisville to Washington, or sold a round-trip ticket from Washington to Louisville and return to Washington, and the plaintiff, Mrs. Howard, had the return part of that ticket, that alone would not be sufficient evidence to establish the fact that the Chesapeake & Ohio Railroad Company was operating this Elizabethtown, Lexington, & Big Sandy road. We all know that railroad companies habitually sell tickets over their own roads and, in connection with them, over other roads, so that the mere sale of such a ticket, and that in itself, would not be sufficient. It must appear from all the evidence, to your satisfaction, not only that this defendant sold a ticket over that road, upon the faith of which this lady was riding at the time, but in order to hold the defendant liable you should find that the Chesapeake & Ohio Railroad Company, as a corporation, by its officers and agents, was operating this road; that that corporation, the Chesapeake & Ohio Railroad Company, controlled this road, operated it, ran it, and that the trains which ran over it were the trains of the Chesapeake & Ohio Railroad Company; that they were manned by their employees and controlled by their officers and agents; and, unless you find that the evidence establishes that state of facts, you would find for the defendant upon that point, because, in order to render the defendant liable for this accident, if it was caused by negligence, it must appear to your satisfaction by a preponderance of evidence that the Chesapeake & Ohio Railroad Company controlled and were running its trains over this road.

"Perhaps I may aid you a little further upon that question without touching upon your province, for the fact is all for you. There is evidence here tending to show that state of facts. The plaintiffs claim that the evidence is sufficient to establish it; that is, the Chesapeake & Ohio Railroad Company controlled this particular road, and was

## Chesapeake &amp; Ohio Railway Co. v. Howard

running trains over it at the time of this accident. The defendant denies that the evidence is sufficient to establish those facts, and it is for you to determine which one of them is right in relation to it. The defendant also says that even if the evidence is sufficient to establish that state of facts at any time, that state of facts did not exist at the time of this accident; that it was ended in January, 1886, some months prior to this accident, by the lease which the Elizabethtown, Lexington, & Big Sandy Railroad Company made to the Newport News & Mississippi Valley Railroad Company. That lease is in evidence. I suggest that you divide that subject into two heads. First, determine whether the evidence is sufficient, when you take it all together, to establish to your satisfaction the fact that the defendant here, the Chesapeake & Ohio Railroad Company, was controlling and running the Elizabethtown, Lexington, & Big Sandy road prior to the execution of this lease to which I have just referred. If you find the evidence insufficient to establish that, you might dismiss that subject, I should say, without looking any further, and find for the defendant. But if you find from the evidence that the Chesapeake & Ohio Railroad Company, immediately before the execution of this lease just mentioned, was operating and controlling this Elizabethtown road, then you would naturally pass to the next step, which is, whether the execution of this lease and the facts and circumstances attendant upon it ended that arrangement, so that the Chesapeake & Ohio Railroad Company ceased at the time of the execution of that lease to control and run the trains upon that road."

We think this charge was in substance correct, although we do not suppose it was necessary, in order to hold the Virginia company liable, that it should have had the complete control and management of the road of the Kentucky corporation. If it had the control and management of that train it would have been sufficient, even though the Kentucky or the Connecticut company managed and controlled other and local trains over the road of the Kentucky company.

*Chesapeake & Ohio Railway Co. v. Howard*

The point would be whether there was evidence enough to submit the question to the jury as to the management and control of the train by the plaintiff in error. Upon a careful consideration of the whole case and all the various circumstances prior to and connected with the making of these leases, we think there was evidence sufficient to allow the jury to pass upon that question as one of fact, and the decision of the jury in favor of the plaintiff ought not to be disturbed.

The evidence shows, that in each of the three corporations there was but one controlling and guiding hand; that all the steps taken were steps in the direction of establishing, organizing, and maintaining a continuous line of road from one ocean to the other, and that the various contracts, arrangements, and leases were but means to accomplish this one purpose; that the Virginia company, under the guidance and direction of Mr. Huntington, held itself out to the world as a carrier or transporter, and not a mere forwarder, of passengers from Washington to Louisville or the reverse, and that it issued tickets as evidence or tokens of its contract to so carry. The mere formal existence of these leases does not change the actual facts in the case. Assuming their validity, they are not conclusive against the defendants in error. They could exist, and the train in question in this case might still have been under the general control of or managed by the Virginia corporation. If so, it was responsible for the neglect of the agents employed by it. The fact that the Kentucky road had immediately prior to the lease been in the actual control and management of the Virginia company, when taken in connection with the other evidence in the case, is an important one in determining the main question as to the continuation of such management of the road or of the train after the execution of the lease to the Connecticut corporation. In our judgment a submission of the question as one of fact for the jury was not error.

Another question was argued relating to the alleged release of the cause of action by Mrs. Howard upon the payment of

## Note

\$200. The evidence adduced by the plaintiffs in regard to the release was sufficient, if believed, to render it unavailable as a defense. The question was submitted to the jury under instructions quite as favorable to the defendant as it was entitled to, and the finding in favor of the invalidity of the paper ought not to be disturbed.

We have carefully examined the other questions made by the plaintiffs in error, including that in regard to the want of jurisdiction because of an alleged insufficient service of process, but we are satisfied that no error has been committed, and *the judgment must therefore be affirmed.*

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NOTE.

**Corporations—Liability for Ultra Vires Torts.**—The doctrine of *ultra vires* has no application to the wrongs done by a corporation; hence corporations are liable for every wrong of which they are guilty. *Philadelphia W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 209; *Green v. London Omnibus Co.*, 7 C. B. 290; *Life & Fire Ins. Co. v. Mechanics' Ins. Co.*, 7 Wend. (N. Y.) 31; *First Nat. Bank v. Graham*, 100 U. S. 699; *Bissell v. Michigan Southern, etc., R. Co.*, 22 N. Y. 258; *Salt Lake City v. Hollister*, 118 U. S. 256; *Alexander v. Relfe*, 74 Mo. 495; *South. etc., R. Co. v. Chappell*, 61 Ala. 527. In this last case it was said: "It is not necessary, to fix the liability, that the wrongful act, or the negligence from which the injury proceeds, should have been committed while the corporation was in the exercise of the powers conferred by its charter. It may have been committed while the corporation, or its servants or agents, acting under its authority, were exceeding corporate power or engaged in business or transactions wholly foreign to its nature."

In *Pronger v. Old Nat. Bank* (Wash.), 1 Banking Cas. 399, the court said: "Whatever the rule may have been formerly, it is now settled beyond controversy that a corporation is liable to the same extent, and under the same circumstances, as a natural person, for the consequence of its wrongful acts, and will be held to respond, in a civil action, at the suit of an injured party, for every wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transactions may be. In such cases the doctrine of *ultra vires* has no application. *Bank v. Graham*, 100 U. S. 699; *Merchants' Bank v. State Bank*, 10 Wall. 604; *State v. Morris & E. R. Co.*, 23 N. J. Law 360; *Railway Co. v. Harris*, 122

Note

U. S. 597, 7 Sup. Ct. 1286; *Alexander v. Relfe*, 74 Mo. 495; *Buffalo Lubricating Oil Co. v. Standard Oil Co.* (N. Y. App.), 12 N. E. 825; *Jackson v. Insurance Co.* (N. Y. App.), 1 N. E. 539; *Nevada Bank of San Francisco v. Portland Nat. Bank*, 59 Fed. 338; *Thomp. Corp.* §§ 6329, 6279."

It is no defense to an action of tort that the tort complained of resulted from an act which was *ultra vires*. So, where a corporation undertakes to carry passengers, and one of them is injured by its negligence, it is immaterial to inquire, in an action for damages, whether the corporation had or had not the power, under its charter, to carry passengers. *Gruber v. Washington & J. R. Co.*, 21 Am. & Eng. R. Cas. 438, 92 N. Car. 1.

Plaintiff was injured owing to the mismanagement of a horse-car. Defendant contended that even if the jury found that it ran such horse-cars, as it had no franchise to do so it could not be liable to the action. *Held*, that such defense was untenable. *New York, L. E. & W. R. Co. v. Haring*, 21 Am. & Eng. R. Cas. 436, 47 N. J. L. 137.

Where a corporation is sued on a contract, it may defend on the ground that the contract was *ultra vires*; but this rule does not apply to actions *ex delicto*, founded on a tort committed by the officers or employees of the corporation while in the discharge of their duty. *Central R. & B. Co. v. Smith*, 25 Am. & Eng. R. Cas. 25, 76 Ala. 572, 52 Am. Rep. 353.

A corporation may be liable for the wrongful acts of its agents where such agents were exceeding its corporate power, and were, by its authority, engaged in transactions wholly foreign to its nature. *South. & N. Ala. R. Co. v. Chappell*, 61 Ala. 527.

But to render a corporation liable in an action *ex delicto* for damages caused by the negligence of its agents or employees in the performance of a contract which is *ultra vires*, it must be shown that the contract was its corporate act, and not the unauthorized act of its officers or agents. *Central R. & B. Co. v. Smith*, 25 Am. & Eng. R. Cas. 25, 76 Ala. 572, 52 Am. Rep. 353.

Where a railroad company damages by fire lands belonging to a manufacturing corporation, it cannot escape responsibility by showing that the corporation was not permitted by its charter to acquire title to the property, or that it acquired the title for purposes unauthorized by law. *Farmers' L. & T. Co. v. Green Bay & M. R. Co.*, 11 Biss. (U. S.) 334, 12 Fed. Rep. 773.



St. Louis &amp; S. F. R. Co. v. Burrows

ST. LOUIS &amp; S. F. R. CO.

v.

BURROWS.

*(Supreme Court of Kansas, June 9, 1900.)*

**Injury to Passenger—Presumption of Negligence.\***—In an action by a passenger against a common carrier to recover for personal injuries received while traveling in a conveyance of the latter, proof of the accident and plaintiff's injury casts the burden upon the carrier to free itself from the presumption of negligence. The gist of the action being the negligence of the defendant, the above rule is not applicable in such a suit against a railway company where the evidence introduced by the plaintiff shows that the accident resulted from an act of God, unavoidable casualty, or from causes not connected with the construction, operation, or maintenance of the railway.

**Same—Contributory Negligence.†**—Whether it is an act amounting to contributory negligence for a passenger, traveling in the caboose of a freight train in motion, to stand up and lean forward to spit in a stove in the car, should be left to the jury.

**Instructions.**—It is error for the court to instruct the jury that their answers to particular questions of fact submitted should be consistent each with the other. *Brick Co. v. Zimmerman*, 60 Pac. 1064, 61 Kan.—, followed.

**Evidence of Existing Pain.‡**—The case of *Railroad Co. v. Johns*, 36 Kan. 769, 14 Pac. 237, as to the admissibility of complaints of an injured person concerning the presence of existing pain adhered to.

**Instructions.**—An instruction criticised, in which the jury were told that, before the defendant could avail itself of a plea of contributory negligence, it must establish the facts pleaded in defense.

(Syllabus by the Court.)

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\*See generally *McCafferty v. Pennsylvania R. Co. (Pa.)*, 16 Am. & Eng. R. Cas., N. S., 122, and *notes*, 126 *et seq.*

†See generally *Lane v. Spokane Falls & N. Ry. Co.*, 14 Am. & Eng. R. Cas., N. S., 436, and *note*, 458.

‡See *Mott v. Detroit, etc., R. Co. (Mich.)*, 15 Am. & Eng. R. Cas., N. S., 113, and *note*, 122 *et seq.*

St. Louis & S. F. R. Co. v. Burrows

**ERROR** by defendant from Cherokee county district court.  
*Reversed.*

In his petition in the court below, plaintiff alleged the following facts in substance: That on the 28th day of February, 1898, he purchased a ticket for first-class passage over defendant's railroad from Halliwell, Kan., to Columbus, Kan., and that while riding upon a freight train upon its regular run, and upon which it was the custom and habit to carry passengers, he was injured by reason of the negligence of defendant, its agents and employees, in the following manner: The train upon which he was going, while traveling at the rate of from 10 to 15 miles per hour, came to a short, sudden, and abrupt stop, and caused him to be violently thrown down and forward, thereby seriously breaking his left arm just above the wrist, by which fall his back was wrenched and twisted, and his left side bruised, thereby inflicting upon him permanent injury, etc. The answer of the railroad company contained, first, a general denial, and an allegation of contributory negligence upon the part of plaintiff below. The testimony of plaintiff below, in which he gave an account of the accident and how it occurred, we have extracted from the record, and it is as follows: "Q. Now, where were you when they started? A. I was sitting down when they started. Q. Now, go right on and tell, Mr. Burrows, what took place, how far they had run when it took place, if anything did, and all about it. A. Well, they had run about a quarter, I guess— Q. Go right on. A. About a quarter of a mile, or somewheres near that, and they were going fast, or down grade, and they just lit right out. Then all to once they just stopped, as sudden as if they had run against a mountain. Q. Now, state to the jury just the position you were in at the time they stopped, as you have stated, or just about. I wish you would just show the jury the position you occupied all the time. (Counsel brings seat, and places before the jury, and witness uses same for illustration.) A. Well, I was sitting right down close—middling close—to the stove; and, as the train started

## St. Louis &amp; S. F. R. Co. v. Burrows

off, I might have been sitting there a second or two, or a half a minute, or something like that. I couldn't tell just how long I was sitting there. And I raised up, to look around, to see whether I could see any place to spit. I chew tobacco. I didn't want to spit on the floor. And I raised up to spit in the stove. Q. Go right on, Mr. Burrows, and state. A. I went to spit, and I looked around to see if there was any spittoon, and there wasn't none there, and I just merely raised up and braced myself in that way (indicating) to spit; and there was a sudden check or stop came, and I went over and broke my arm." As to the position plaintiff was in when he fell, he testified as follows: "Q. You looked around on the dirty floor to find some place to spit, and couldn't find any? A. I did. Q. Then you rose up, and about this position, for to brace yourself with your left foot, and put yourself in the position to spit in the stove? (Counsel indicates position on seat before the jury.) A. Yes, sir. Q. And you were about in the position then that I am now? A. Somewheres near that. Q. Well, very nearly that, is it not? A. Well, I don't know; yes. Q. Was that the position you were in when on your direct examination? A. Yes, sir. Q. Your face was about  $2\frac{1}{2}$  feet from the floor? A. Well, I couldn't tell how far it was. Q. And your left arm was about  $1\frac{1}{2}$  feet from the floor? A. I don't know how far it was. Q. That is the position that I am in now? A. I don't know whether it was or not, exactly. Q. That is as near as you can remember? A. No; if you put your hand back there I can remember. Q. Back here? (Counsel puts left hand back on seat.) A. That is where it was. Q. Your left hand back on the seat? A. Yes, sir. Q. Then your face was about  $2\frac{1}{2}$  feet from the floor, and the left hand was against the seat, your left foot extended to brace you, and was in that position when you fell? A. Yes; somewheres near that position. Q. That is as near as you can now state it? A. Yes, sir. Q. Now, about how far were you from the stove? A. Well, I was probably two feet; maybe not quite so far. Q. West of it? A. I was west of it. Q. And about how

St. Louis & S. F. R. Co. v. Burrows

far north of it were you? A. Well, I wasn't very far north. It was pretty close. Q. Now, you say when the train suddenly stopped you fell between the stove and the seat? A. Between the stove and the seat. Q. Now, after you had fallen to the floor, how soon thereafter did you see the drummer? A. Well, I seen him just as soon as I fell down on the floor; and there he came to me, and I was trying to get up. He came and helped me up. I could not get up myself,—I was hurt so,—with one hand, and the train was running. Q. Now, Mr. Burrows, after the sudden stop and fall which you met with, and the injury you received, what did the train then do? A. It ran right on. Q. Just kept up and went on east? A. Just went right on east. According to my judgment, the train was running at a speed of from ten to fifteen miles an hour when the accident happened. Q. You say the drummer assisted you to your feet after you fell there? How did he do it? A. Why, he got up and got around me. I could not tell you just how, but he caught hold of me around me, and, says he, 'Are you hurt?' I says, 'Yes; my back.' I think I said my back and arm was hurt. Q. Now, you say that when you fell in the car you fell with your head to the east,—to the eastward? A. Right to the east,—eastward; yes. Q. Fell between the seat and the stove? A. Yes, sir. Q. The car was neat and clean and tidy? A. Not very. Q. It wasn't clean? It was dirty inside? A. Yes, sir; on the floor." There was no evidence introduced on behalf of the defendant railway company. The jury, in answer to particular questions of fact, found that plaintiff was 56 years old, and of sound mind and judgment; that the train was not moving when he got on, and the caboose had arrived at the depot at that time; that plaintiff had been on the train 5 or 10 minutes before the accident occurred, and was moving at the time of the injury at least 10 miles an hour; that plaintiff fell towards the engine; that there were seats in the caboose that plaintiff might have occupied; that the accident would have occurred if plaintiff had been sitting down; that the train was a quarter of a mile from the depot

St. Louis &amp; S. F. R. Co. v. Burrows

when the accident happened; that plaintiff had traveled on freight trains, and knew that there was more or less jar and jolt in the handling of the same; that he did not tell the conductor there was no use of making any report of the accident; that he was on the north side of the car, west of the stove, when the injury occurred; that he was not standing up in the car, and was not injured by an unavoidable accident; that the train was running between Halliwell and Sherwin when the accident occurred, and that the conductor knew plaintiff was on the train; that some member of the train crew was negligent, but the evidence did not show which one, and that the negligence consisted of improper handling of the train; that plaintiff was not injured by the reason of running in or out of slack of the train; that the train was not handled in the usual and ordinary manner, in that it was suddenly and violently stopped; that the crew might have been competent, but they were not careful at the time of plaintiff's injury; that they could not tell which member of the crew was not careful and competent; that the sudden stopping of the train was the direct and proximate cause of the injury. There was a general verdict for the plaintiff below, and answers returned to particular questions of fact, upon which judgment was rendered by the court. A motion for a new trial was overruled.

*J. W. Glead, J. S. Hunt, Glead, Ware & Glead, and D. E. Palmer*, for plaintiff in error.

*Chas. Stevens, C. A. McNeill, and Chas. Smith*, for defendant in error.

SMITH, J. (after stating the facts). Counsel for plaintiff in error earnestly contended that the trial court erred in overruling their demurrer to the evidence, for the reason that the testimony introduced by plaintiff below raised no presumption of negligence upon the part of the railroad company or its servants in the operation as the train. They cite authority to the effect that, if the accident occurred under circumstances which might be attributable to causes

St. Louis &amp; S. F. R. Co. v. Burrows

unavoidable upon the part of the railroad company, mere proof of plaintiff's injury is insufficient to make out a *prima facie* case of negligence against the carrier. We have carefully examined the cases referred to by plaintiff in error, together with others involving this question, and conclude that the rule of evidence

Injury to Passenger—Presumption of Negligence.

in cases of injury to a passenger is in accord with the decision of this court in *Railroad Co. v. Elder*, 57 Kan. 312-316, 46 Pac. 311. An accident resulted in death. The deceased left a widow and next of kin surviving him. The court, by MARTIN, C. J., said: "Under the pleadings and the allegations of negligence contained in the petition, it devolved upon the plaintiff below, in the first instance, only to prove the derailment, the injury of the passenger thereby, that death occurred from the injury, and that the deceased left a widow or kindred surviving him; and it then became incumbent upon the company, in order to escape liability, to show that the derailment resulted from inevitable accident, or something against which no human prudence or foresight on the part of the company could provide. *Railway Co. v. Walsh*, 45 Kan. 653, 659, 26 Pac. 45, and cases cited; *Railway Co. v. Johnson*, 55 Kan. 344, 345, 40 Pac. 641." If the testimony introduced on behalf of the plaintiff in such cases should develop that the injury resulted from an act of God, unavoidable casualty, or from causes not connected with the construction, operation, or maintenance of the railroad, then the burden of proof would not shift to the defendant to account for the accident, for the explanation itself (made by the plaintiff) would exonerate the carrier from the charge of negligence. The gist of the action is want of care on the part of defendant. A presumption of negligence in such cases arises, not from the fact of the injury alone, but from its cause or the circumstances attending it; and if such circumstances as detailed in the testimony introduced by the plaintiff should show, for instance, that he was shot through a window by a person distant from the track, or that the train was struck by lightning, or that he fell down while the

## St. Louis &amp; S. F. R. Co. v. Burrows

train was standing still, or that the accident happened in some other manner wholly beyond the control of the carrier or its servants, there would be no presumption of negligence for the defendant to rebut, for the reason that the plaintiff had, in his account of the accident, disproved the charge of negligence made by him. The railroad company being held to the highest degree of care which human prudence or foresight can provide, it is sufficient in this class of cases to show *prima facie* that the injury was occasioned by the failure of some portion of the machinery, appliances, or means provided for the transportation of passengers, or any other thing which the carrier can and ought to control, as a part of its duty to carry passengers safely. *Meier v. Railroad Co.*, 64 Pa. St. 225. A presumption of negligence arises from the occurrence of an accident, alone, when it proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. *Transportation Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160. In *Gleeson v. Railroad Co.*, 140 U. S. 435-444, 11 Sup. Ct. 862, 35 L. Ed. 463, this question was considered by the supreme court of the United States. The accident in that case occurred by reason of a landslide in a railway cut caused by an ordinary fall of rain. It was held that an injury to a passenger, caused by the train coming in contact with the earth which had fallen down upon the track, raised a presumption of negligence on the part of the railway company, and threw the burden of proof of showing that the slide was in fact the result of causes beyond the control of the railway company upon the latter. In passing upon the question the court said: "The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility or of the act

## St. Louis &amp; S. F. R. Co. v. Burrows

of God, it is still none the less true that the plaintiff has made out his *prima facie* case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances." See Lawson, Pres. Ev. p. 128. We think the plaintiff below, by the testimony offered in his behalf, brought the case within the established rule, and that when he rested a *prima facie* charge of negligence had been made out, which the railway company was called upon to meet, in order to overcome the presumption against it. Nor can we hold as a matter of law, that the plaintiff below was guilty of contributory negligence. This question was one for the jury. Railroad Co. v. Hughes, 55 Kan. 491, 40 Pac. 919. We cannot say, from the fact that plaintiff below leaned over towards the stove to spit, that he Same—Contributory Negligence. was guilty of an act of negligence. This is not an uncommon thing to do. Railroads recognize the general use of tobacco, both for smoking and chewing, by running smoking cars on all passenger trains, and by furnishing their coaches with cuspidors. Plaintiff was riding in a caboose attached to a freight train, and it is not quite clear from the testimony what his position was immediately before he was hurt; but it would seem that he had assumed a crouching position, with one hand upon the seat, to brace himself. In Beaver v. Railroad Co., 56 Kan. 514, 43 Pac. 1136, it is said: "In an action to recover for personal injuries, where the defense is contributory negligence on the part of the plaintiff, the court cannot take the case from the jury, and determine, as a matter of law, that the plaintiff was negligent, where the standard of care required of him was a subject upon which different opinions might be entertained, and where the facts shown and inferences to be drawn from them were such that



## St. Louis &amp; S. F. R. Co. v. Burrows

reasonable minds might differ with respect to whether he had acted as a reasonably prudent man should have done under the circumstances."

Objection is made to the reception of testimony of professional and lay witnesses relating to complaints of plaintiff with regard to the existence of his pain and suffering, communicated to them after the accident. Counsel for plaintiff below, in propounding questions upon this point, brought themselves strictly within the rule stated in *Railroad Co. v. Johns*, 36 Kan. 769, 14 Pac. 237, and inquired concerning the presence of existing pain, and the answers given were responsive to such questions. There was no error in the admission of such testimony.

Particular questions of fact were submitted to the jury on behalf of the defendant, to be answered, and one of the instructions relative thereto is as follows: "Your answers to these questions, if any, should be consistent each with the other, and should be answered in the event that your verdict is for the plaintiff, in the light of the testimony, after due consideration thereof, and under the rules of law given you in this case." There was error in this direction to the jury. It was not their duty to reconcile the answer of any particular question of fact with another, but to answer each question in accordance with the preponderance of evidence bearing upon the fact involved in the interrogatory. *Brick Co. v. Zimmerman*, 61 Kan.—, 60 Pac. 1064, and cases cited. This erroneous instruction compels a reversal of the cause, and, in view of another trial, we think that the following instruction is subject to criticism: "The plea of carelessness and want of due care and caution on the part of the plaintiff is an affirmative plea tendered by the defendant, and, before it can avail itself of the relief in such plea sought, it must establish by the fair weight of the evidence the facts stated in such allegation and defense." By this direction the jury might have been misled into the belief that if the plaintiff, by testimony offered in his behalf,

Chicago, etc., Ry. Co. v. Farwell

had shown contributory negligence upon his part, the same could not avail the defendant, because the fact of such contributory negligence was not established by the company. A similar instruction was passed upon and criticised in case of *Railway Co. v. Merrill*, 61 Kan.—, 60 Pac. 819-822. Again, the court instructed the jury that if they found that the plaintiff, by reason of his carelessness and negligence, as alleged by the defendant in its answer, occasioned the injury, then there could be no recovery. In <sup>Instructions.</sup> the answer it was alleged that the injury was occasioned wholly by the plaintiff's own carelessness and negligence. It would thus follow from the instruction that the plaintiff might nevertheless recover, although his injury was occasioned partly through his own negligence. The instruction was misleading. The judgment of the court below will be reversed, and a new trial ordered. All the justices concurring.

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CHICAGO, R. I. & P. RY. CO.

v.

FARWELL.

(*Supreme Court of Nebraska, Jan. 3, 1900.*)

Evidence in Condemnation Proceedings—View by Jury.\*—The view of the *locus in quo* by the jury is evidence, and not merely better to enable the jury to construe and apply the evidence adduced in court.

(Syllabus by the Court.)

ERROR by plaintiff to Lancaster county district court.  
*Reversed.*

*W. F. Evans and Billingsley & Greene*, for plaintiff in error.

*Tibbets Bros., Morey & Anderson*, for defendant in error.

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\*See notes at end of case.

Chicago, etc., Ry. Co. *v.* Farwell

NORVAL, J. The Chicago, Rock Island & Pacific Railway Company instituted condemnation proceedings in the county court to acquire right of way over and across certain real estate belonging to J. V. Farwell, Jr. Commissioners were duly appointed by the county court to assess the damages, who awarded the landowner the sum of \$2,200. The railway company prosecuted an appeal to the district court, where the cause was tried to a jury, who returned a verdict in favor of Farwell in a like sum. From the judgment subsequently entered thereon he prosecuted a petition in error to this court, which was sustained, and the judgment was accordingly reversed. *Farwell v. Railroad Co.*, 52 Neb. 614, 72 N. W. 1036; *Id.*, 53 Neb. 706, 74 N. W. 257. A second trial in the district court terminated in a verdict and judgment for the landowner for the sum of \$4,692.90, and the cause is now before us at the instance of the railway company.

During the second or last trial of this cause in the court below the jury were permitted and directed by the court to view the premises in controversy, and they were instructed as follows: "(9) You were sent to view the lots in question, not for the purpose of furnishing any evidence to you of their value, or that you might in any manner be made witnesses concerning such value, but for the sole purpose that you might thereby be placed in a better position to understand the testimony theretofore received. The purpose of said view is by the law thus limited, and you must consider it in no other light, or for any other purpose." An exception was taken by the railway company to this paragraph of the charge of the court, and its giving is assigned for error in this court. The instruction was faulty. The view of the premises was evidence, and it was prejudicial error to otherwise instruct the jury. As well say that the plans, photographs, and diagrams of a building which have been introduced and allowed to go before the jury are not evidence, as to hold that a view of the same building by the jurors, permitted by the court, is not evidence. The view of the

Chicago, etc., Ry. Co. v. Farwell

*locus in quo* is not allowed merely to enable the jury better to understand and apply the evidence, although many courts have so decided. There is a sharp conflict in the authorities on the subject, but the sounder doctrine is contained in the following language of Thomp. Trials, § 893: "There is no sense in the conclusion that the knowledge which the jurors acquire by the view is not evidence in the case. The conception that what a body of jurors see for themselves, relevant to the issue to be decided by them, is not evidence, but something to be considered by them in weighing oral evidence, is nonsense. What they see is evidence in a primary sense, and what is detailed to them concerning the same subject-matter by witnesses is evidence in merely a secondary sense. An objective lesson always impresses itself more vividly upon the mind than an oral lesson. Such a conclusion is tantamount to saying that they are to take the trouble of going in a body to inspect land or other material object out of court, and that when they come to make up their verdict they must resolutely forget the impressions acquired from such inspection. The conception that a body of freeholders residing in the vicinity shall view the land in controversy in a proceeding to expropriate it for public use, and then shall put out of sight in making their estimate of damages their own knowledge of the value of land in that vicinity, applied to the character of the particular land as they have observed it, is also nonsense. Impressed with this view, the supreme court of Wisconsin, speaking through LYON, J., has said: 'We understand that the object of a view is to acquaint the jury with the physical situation, condition, and surroundings of the thing viewed. What they see they know absolutely. If a witness testified to anything which they know by the evidence of their senses on the view is false, they are not bound to believe—indeed, cannot believe—the witness; and they may disregard his testimony, although no other witness has testified on the stand to the fact as the jury know it to be. For example, if a wit-

## Chicago, etc., Ry. Co. v. Farwell

ness testified that a certain farm is hilly and rugged, when the view has disclosed to the jury, and to every juror alike, that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned, no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in disregard of the testimony given in court.' *Washburn v. Railroad Co.*, 20 Am. & Eng. R. Cas. 225, 18 N. W. 330. That court accordingly has held that the knowledge which the jurors acquire in making the view is evidence to be considered by them in assessing damages in a proceeding for the condemnation of land for public use, upon which they may act to the exclusion of contradictory evidence; and similar views prevail in other jurisdictions." In *Carroll v. State*, 5 Neb. 31, what the jury saw in viewing the scene of a crime was considered as evidence. *Railroad Co. v. Walker*, 17 Neb. 432, 23 N. W. 348, was a proceeding to assess damages to property appropriated by the railroad company for its right of way. One of the grounds relied upon for a reversal was that the damages were excessive. Upon this branch of the case the court said: "At the request of the plaintiff in error the jury were permitted, under proper restrictions, to view the right of way across the lands of the several defendants, and in what way they were damaged by the location of the road. Where this is permitted, it is difficult to review the judgment as being against the weight of evidence before the jury. The view of the premises cannot, from the nature of the case, be incorporated in the record; and in these cases there is no such discrepancy between the evidence in the record and the verdict as to justify the court in setting them aside, which the court would not do unless it was clear that the jury had erred." The principle that a view of the premises by a jury is evidence has been recognized and applied by this court in other cases, which we will not take the time to cite. But it is argued that *Neal v. State*, 32 Neb. 120, 49 N. W. 174, sustains the instruction of which complaint is made in the case at bar. This contention is not well founded.

## Notes

The question herein involved was not passed upon in the case to which reference has just been made, but, rather, that a defendant in a criminal case could waive the right to be present while the jury are viewing the place where the homicide occurred. We are fully convinced that the instruction quoted above was erroneous, and should not have been given. For this reason the judgment must be reversed.

## NOTES.

**View of the Premises by a Jury in Condemnation Proceedings.**—The general rule is that the only office of a view of the premises by a jury in condemnation proceedings is to enable them to determine the weight of the conflicting testimony respecting value and damages. *Seefeld v. Chicago, etc.*, R. Co., 67 Wis. 96, 27 Am. & Eng. R. Cas. 428; *Washburn v. Milwaukee, etc.*, R. Co., 59 Wis. 364, 20 Am. & Eng. R. Cas. 225; *Munkwitz v. Chicago, etc.*, R. Co., 64 Wis. 403; *Close v. Samm*, 27 Iowa 503; *Lafin v. Chicago, etc.*, R. Co., 33 Fed. Rep. 415; *Peoria G. L. & C. Co. v. Peoria Term. R. Co.*, 146 Ill. 372, 57 Am. & Eng. R. Cas. 490, 34 N. E. 550.

The right given the jury to personally examine the premises is not to be construed as permitting them to disregard the sworn testimony in fixing the assessment of damages. *Atchison, T. & S. F. R. Co. v. Schneider*, 127 Ill. 144, 2 L. R. A. 422, 20 N. E. Rep. 41; *Flower v. Baltimore & P. R. Co.*, 132 Pa. St. 524, 19 Atl. Rep. 274; *Peoria G. L. & C. Co. v. Peoria Term. R. Co.*, 146 Ill. 372, 57 Am. & Eng. R. Cas. 490, 34 N. E. Rep. 550; *Chicago, etc., R. Co. v. Parsons*, 51 Kan. 408, 32 Pac. Rep. 1083; *Biglow v. Draper* (N. Dak.), 69 N. W. Rep. 570.

So, while the jury may resort to their own knowledge of the premises, obtained from a view thereof, and to their general knowledge of the elements which effect the assessment, in order to determine the relative weight of conflicting testimony as to value and damages, their assessment must be supported by the testimony or it cannot stand. Instructions from which the jury might reasonably have understood that they were to assess the compensation according to their own knowledge, judgment, and good sense, aided by their view of the premises, and that they might do so without regard to the testimony or in opposition thereto, are erroneous. *Washburn v. Milwaukee & L. W. R. Co.*, 20 Am. & Eng. R. Cas. 225, 59 Wis. 364, 18 N. W. Rep. 328; *Peoria C. L. & C. Co. v. Peoria Terminal R. Co.*, 146 Ill. 372, 34 N. E. Rep. 550; *Seefeld v. Chicago, M. & St. P. R. Co.*, 67 Wis. 96, 29 N. W. Rep. 904.

## Notes

In *Washburn v. Milwaukee, etc., R. Co.*, 59 Wis. 364, 20 Am. & Eng. R. Cas. 225, the court instructed the jury as follows: "You are to determine it (the compensation) from the whole evidence that has been given you in the case, from your view,—you take the view you make, you take your own knowledge, your own judgment, your own good sense." *Held*, that this instruction was erroneous. *LYON, J.*, said: "We understand that the object of a view is to acquaint the jury with the physical situation, condition, or surroundings of the thing viewed. What they see they know absolutely. . . . Hence, whatever the jury in each of these cases learned of the lands in question by the view, was available to enable them to determine the weight of conflicting testimony respecting value and damages, but no further. . . . The juries in these causes might reasonably have understood the instructions to be that they were to assess the compensation to which the respective plaintiffs were entitled, according to their own knowledge, judgment, and good sense, aided by the view, and that they might do so without regard to the testimony or in opposition thereto. We are satisfied, for reasons before stated, that this was erroneous."

The jury having been sent to view the land, the court charged: "What you observed on the view you must remember as part of the evidence. The statements of the witnesses must be considered by you, yet you are not bound to be controlled thereby, if your own examination of the premises leads to a different conclusion." This instruction, when followed by the statement that the verdict must be based upon the testimony of the witnesses and what the jury saw upon the ground, was unobjectionable. All that could fairly be implied from it was that the jury need not ignore the evidence of their senses and give weight to testimony which their view showed to be erroneous. *Gorgas v. Philadelphia, H. & P. R. Co.*, 51 Am. & Eng. R. Cas. 593, 144 Pa. St. 1, 22 Atl. Rep. 715.

While the jury which had taken a view, under the statute, of the premises which is claimed will be damaged by a proposed diversion of a watercourse therefrom, may weigh the evidence as to value in the light of what they have seen, yet their verdict must be within the limits of such evidence. It cannot rest alone upon their own judgment, based upon mere inspection of the property. *Biglow v. Draper (N. Dak.)*, 69 N. W. Rep. 570.

But it was held error to instruct the jury that the sworn testimony given upon the stand bearing upon the subject in controversy, and such reasonable deductions as were legitimately to be drawn from it, in connection with such facts as presented themselves in viewing the premises, constituted the only proper basis on which to rest their verdict, and afforded the only test and criterion by which they were to

## Notes

fashion and fix it. *Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 59 Ind. 100.

The true rule in such cases has been stated to be that the jury, in estimating the damages, shall consider the testimony of the witnesses in connection with the facts as they appeared upon the view, and upon the whole case, as thus presented, ascertain the difference between the market values of the property immediately before and after the taking. *Gorgas v. Philadelphia, H. & P. R. Co.*, 51 Am. & Eng. R. Cas. 593, 144 Pa. St. 1, 22 Atl. Rep. 715; *Hartman v. Reading & P. R. Co. (Pa.)*, 13 Atl. Rep. 774.

In Iowa, the object of a view of the premises has been held to be, to enable the jury to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any could be afforded either party. *Close v. Samm*, 27 Iowa 503; *Harrison v. Iowa Midland R. Co.*, 36 Iowa 323.

**Impression Produced by View of the Premises Not Part of the Evidence.**—The impression produced upon the minds of the jurors by a view of the premises does not constitute a part of the evidence in the cause, and cannot be considered in rendering their verdict. *Heady v. Vevay, etc., Turnpike Co.*, 52 Ind. 117; *Jeffersonville, etc., R. Co. v. Bowen*, 40 Ind. 545, overruling *Evansville, etc., R. Co. v. Cochran*, 10 Ind. 560; *Close v. Samm*, 27 Iowa 503; *Harrison v. The Iowa Midland R. Co.*, 36 Iowa 323.

**Contrary Doctrine.**—In Illinois, the jury have a right to view the premises and draw their own conclusions from their observations, as well as from other testimony offered in the case. *Mitchell v. Illinois, etc., R. Co.*, 85 Ill. 566.

Such personal examination by the jury is in the nature of evidence to be considered by them, and a new trial will not be granted, even though the preponderance of the evidence presented in the record is clearly against so large an assessment as found by the jury, as the results of their personal investigation may have fully justified the verdict. *Chicago & Iowa R. Co. v. Hopkins*, 90 Ill. 316.

The result of a jury's personal view of the land is evidence proper to be acted upon by them; and if they believe, from the whole evidence, that they have, from such view, arrived at a more accurate judgment as to the value of the premises sought to be taken, and of the damages, than that shown by the evidence in open court, they may, upon the evidence, rightfully fix the value of the land taken, and the damages, at the amount so approved by their judgment



## Notes

formed from the personal examination, even though it differed from the amount testified to, and the weight of testimony given by witnesses in open court. *Kiernan v. Chicago, S. F. & C. R. Co.*, 123 Ill. 188, 14 N. E. Rep. 18, 11 West. Rep. 632.

The jury are judges of law and facts, and their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders, as much as the testimony of witnesses to matters of opinion; and appellate courts should not interfere, unless the errors complained of as such as may fairly be said to have had a controlling influence in securing the result. *Fort St. Union Depot Co. v. Jones*, 83 Mich. 415, 47 N. W. Rep. 349; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 5 Am. & Eng. R. Cas. 378, 47 Mich. 456, 11 N. W. Rep. 271.

And in *Harper v. Lexington, etc., R. Co.*, 2 Dana (Ky.) 325 it was held, that the jury may take their assessment upon their own view and need not decide on evidence furnished by the parties.

In *Penn. R. Co. v. Keiffer*, 22 Pa. St. 356, the court held that, while the viewers must determine for themselves by their own examinations, and upon their own judgments, and yet they are not prohibited from examining witnesses to aid in their determination.

In a Louisiana case, it was held that a jury empanelled to estimate the value of property in condemnation proceedings should have a personal knowledge of the value of the real estate in the vicinage, so as to rely upon their own opinion in forming their judgment, although it was proper that their own opinion should be aided, especially if they request it, by the opinions of witnesses; that they were experts and should personally examine the premises in a body. *Remy v. 2d Municipality*, 12 La. Ann. 500. In this case, the court below refused to charge the jury as requested by counsel, that in assessing the amount to be paid to the plaintiffs they were to be guided by the testimony of the witnesses, but, on the contrary, charged that they were not bound to consider it, if not disposed to do so, "but might disregard it altogether, and decide on their own notion unaided by it." (See dissenting opinion of VOORHIES, J.) The judgment, however, was affirmed.

**Statutory Provisions.**—In Kansas and Iowa, the matter of viewing the premises by the jury is left by statute to the discretion of the court. See *Kansas Central R. Co. v. Allen*, 22 Kan. 285; *King v. Iowa Midland R. Co.*, 34 Iowa 458.

The action of the court in exercising its discretion will not be disturbed where no abuse of the discretion appears. *King v. Iowa Midland R. Co.*, 34 Iowa 458. See also *Snow v. Boston & Maine R. Co.*, 65 Me. 230.

Kay v. Glade Creek & R. R. Co

In Illinois, the statute makes it the duty of the court, at the request of either party, to permit the jury to go upon the land sought to be taken, and examine the same. They may examine the land either before or after the testimony is heard. *Galena, etc., R. Co. v. Haslam*, 73 Ill. 494.

Where the statute directs the commissioners to "proceed to view the premises and make the appraisal," their refusal to examine witnesses in reference to the value of the premises, is not sufficient ground for rejecting their report. *Lyman v. Burlington*, 22 Vt. 131. Where the commissioners are to judge from their own examination of the premises and have no power to swear or examine witnesses, if they do so they exceed their authority. *Van Wickle v. C. & A. R. Co.*, 14 N. J. Law (2 Greene) 162. See also *Stevens v. The Duck River Nav. Co.*, 1 Sneed (Tenn.) 237. Where the statute makes no provision for a view of the premises by the jury, it rests in the discretion of the court to grant or refuse it, and no exceptions will lie to the exercise of that discretion. *Snow v. Boston & Maine R. R.*, 65 Me. 230. See *note* to 27 Am. & Eng. R. Cas. 431.

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KAY

v.

GLADE CREEK & R. R. CO.

(*Supreme Court of Appeals of West Virginia, March 24, 1900.*)

**Appeal—Review.**—Where a stenographic report of evidence is made part of the certificate of evidence upon a motion for a new trial, and it shows objections to questions or evidence, and rulings of the court thereon, and that such rulings were accepted to, and the particular question or evidence complained of is specified distinctly in the motion for a new trial, or in an assignment of error, or in brief of counsel, so that the appellate court can readily and safely find the particular question or evidence to which the exception relates, the appellate court will consider the matter excepted to, though there is no formal bill of exceptions thereto; but such matter will not be considered without such specification, even though such report of evidence notes such objection and exception.

**Eminent Domain—Damages—Danger from Fire from Locomotives.**\*—In ascertaining damages to a landowner, flowing to the residue

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\*See *note*, 13 Am. & Eng. R. Cas., N. S., 385 *et seq.*

*Kay v. Glade Creek & R. R. Co*

of his tract, from the construction of a railroad, danger to buildings, fences, forests, and the like, from fire emanating from locomotives, may be considered as an element of damages, so far as such danger lessens the value of such residue; but such danger must be real, imminent, and reasonably to be apprehended,—not remote or merely possible. The question is, is the residue depreciated in value from that cause, and how much?

**Appeal—Review.**—Where there is an exception to the ruling of the trial court, for allowing or refusing to allow a question to be answered by a witness, and it does not appear what the answer was, or what was expected to be proved by him, an appellate court will not consider the exception, as it cannot determine the relevancy, admissibility, or value of the answer or expected answer. If the question alone show that its answer must be material, and it is refused, it is different. If an answer is stricken out, it must appear, else it will not be considered.

**Eminent Domain — Damages — Opinion Evidence.**—Opinions of witnesses not personally acquainted with land appropriated for railroad purposes are not admissible as to the value of the land actually taken, or damages to the residue, it not being a question of expert evidence; but a person so acquainted and conversant with the land may state the circumstances and respects in which the land is prejudiced or benefited by the railroad, and may then express his opinion as to the value of the land after completion of the road as compared with what it was before.

(Syllabus by the Court.)

**ERROR** by defendant to Raleigh county circuit court.  
*Affirmed.*

*McGinnis & McGinnis* and *John W. McCreery*, for plaintiff in error.

*A. P. Farley* and *J. E. Summerfield*, for defendant in error.

**BRANNON, J.** Elizabeth Kay brought an action of trespass on the case in the circuit court of Raleigh county against the Glade Creek & Raleigh Railroad Company to recover damages sustained by her from the taking of land of hers and using it for the construction of its railroad, and also for damage done to her by fire claimed to have been started from sparks emitted from a locomotive on said railroad, burning some fencing and

Case stated.

Kay v. Glade Creek & R. R. Co

injuring timber. A jury found a verdict for \$1,000, for which the court rendered judgment, and the company has brought the case to this court.

A question important in daily practice arises in this case, which seems, under our decisions, to be in a state more or less chaotic and unsettled. The defendant moved the court to set aside the verdict, and, the court having re-  
fused to do so, certified all the evidence as Appeal—Review.  
taken down by the stenographer; incorporating it in a bill of exceptions, duly noted on the record. Thus, all this evidence is made part of the record by that bill of exceptions. The defendant complains that certain questions propounded by it were ruled out and not allowed to be answered, and that certain questions asked by plaintiff, and objected to by the defendant company, were allowed to be answered. These questions were not made the subject of bills of exception, according to the usual practice, but the stenographic report shows the matter in this wise: When objection to a question was sustained, the report says: "Objection. Sustained. Exception." When objection to a question was not sustained, the report merely says: "Objection. Overruled. Exception." Does this give the excepting parties the benefit of the exception? The questions appear from this report; the objection appears; the exception appears; all the things appear that would appear from a formal bill of exceptions, except only particularity or specification of the particular questions or answers. To get them the court has to grope through the whole report of the evidence, consisting of hundreds of pages very frequently,—in this case, 164 printed pages, consisting of hundreds of questions and answers; and very often a printed record contains several times that much. Can an appellate court be asked to winnow out from the great mass of questions and answers the particular ones constituting the ground of complaint? In the case of instructions or other documents admitted or rejected, the task is not difficult, and the danger of mistake small; but in the case of multitudinous questions it is both difficult

## Kay v. Glade Creek &amp; R. R. Co

and dangerous, from the liability to miss the point. The Virginia court of appeals, in *Railroad Co. v. Shott*, 92 Va. 34, 22 S. E. 811, says: "A general bill of exceptions, certifying all of the evidence, and noting at intervals that objection was made to questions propounded, and the objection overruled, and exception taken, is not a sufficient exception to the ruling of the court on such questions. In order to have the benefit of an exception to the ruling on a motion to reject or admit evidence, there must be a bill of exceptions, signed by the judge, clearly and distinctly pointing out each erroneous ruling complained of; otherwise, the objection will be regarded as abandoned. And, while there may be several exceptions saved by the same bill, yet each must set forth clearly and distinctly the ground of objection relied on, so that there may be no confusion amongst them." So, in *Railroad Co. v. Ampey*, 93 Va. 108, 25 S. E. 226, where there was a stenographic report, the court held that "objections to the admission or exclusion of evidence, or to giving or refusing instructions, should be brought directly to the attention of the trial court, and, if overruled, a proper bill of exception should be taken, specifically and definitely setting forth the allegation of error, and so much of the evidence as is necessary to render clear the propriety or impropriety of the ruling of the court; otherwise, the exception, though noted at the time, will be treated by the appellate court as waived or abandoned." Under those decisions, we could not consider the points complained of in this case. They state the rule of practice always observed before the advent of stenographic official reports of evidence under statutes such as that found in the Code of 1891 (page 1062). That statute makes such report "official and the best authority in any matter of dispute, and a copy of the same, made as hereinafter provided, shall be used by the parties to the cause in any further proceedings, wherein the use of the same may be required." In *Cummings v. Armstrong*, 34 W. Va. 1, 11 S. E. 742, this statute, and the virtue of stenographic reports under it, are discussed by JUDGE LUCAS quite

## Kay v. Glade Creek &amp; R. R. Co

elaborately and well. His view made that report, *per se*, by force of the statute alone, a part of the record. JUDGE SNYDER and myself could not go so far as to hold the report a part of the record, and of absolute verity as such, merely by force of the statute; but we did concede that when that report was made a part of a bill of exceptions by the judge, and thus signally verified by him as correct, such report of evidence became part of the record, and entitled to credit as such. That has been done in this case. I again ask, can the exceptions to the admission and exclusion of evidence, merely noted in short in the stenographic report, in the manner above indicated, be considered by the supreme court, in the absence of a bill of exceptions, under the usual practice, specifically designating the particular evidence complained of as erroneously admitted or excluded? I repeat that the objection, ruling, and exception are part of the record; and, where the answer is given, it is part of the record, also. Thus, the only trouble is want of specification, in the great volume of evidence, of the particular questions allowed or refused to be answered. Let us see what light our past decisions may cast upon the questions: In *State v. Harr*, 38 W. Va. 58, 17 S. E. 794, we find that section 4 of the syllabus says that: "To make available in the appellate court an objection taken during the trial to the admission of evidence, the point must be made, and properly saved by some bill of exceptions. It is not enough merely to note the objection and exception in the certificate of evidence." There is, however, nothing in the opinion touching it. The same holding is found in the syllabus in *Poling v. Railroad Co.*, 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215; but this holding is somewhat qualified by the statement on page 658, 38 W. Va., page 786, 18 S. E., and page 222, 24 L. R. A., that the point "must in some way be so set out as to be capable of being easily found and identified." So, according to that case, if the particular point can be identified,—safely picked out of the mass,—it is allowable to do so, and save the excepting party the benefit of his point, as was intended by the circuit court, and by the

## Kay v. Glade Creek &amp; R. R. Co

party himself, and by the statute. The case of Gregory's Adm'r v. Railroad Co., 37 W. Va. 606, 16 S. E. 819, does not settle the precise point. It holds that where a party moves to set aside a verdict on certain specific grounds, not mentioning others, he waives the others, unless he has made those others the subject of bills of exceptions; that where it is claimed that evidence has been improperly admitted, and exception noted, but no bill of exceptions taken, and the record states that the motion for a new trial was based on certain specific grounds, not naming the admission of such evidence, that exception will be considered as waived in the appellate court. It is to be noted that on page 609, 37 W. Va., and page 820, 16 S. E., it is stated in the opinion that, "If the motion for a new trial had stated that it was based on the improper admission of such evidence, then we could say that the statement in the certificate of evidence that the party had objected and excepted to its admission would be sufficient, without a bill of exceptions."

The question before us is, what shall this appellate court adopt as a rule of practice, under the statute mentioned above, as regards objections and rulings and exceptions merely noted in the stenographic report of the proceedings and evidence in a trial? Must the party complaining, who has objected and excepted to the court's rulings, wholly lose his point because he did not take a formal bill of exceptions, as the Virginia court decided in cases above cited? Why shall he do so, when we can safely find his point? Would not that defeat the purposes of this statute? Is it not intended to portray all the events of the trial? As the trial is taken down, it saves time and great labor to utilize the report for the purpose of showing the thing taking place during its progress. The statute is here, and is acted on, and the report is made official by it. But, on the other hand, here is a great volume of questions, answers, and proceedings, and it is utterly out of the question to ask an appellate court to grope through the labyrinth of matters contained in the report, questions, objections, answers, remarks of counsel and judge, docu-

## Kay v. Glade Creek &amp; R. R. Co

ments, etc., without some guiding specification. To do so would involve a consumption of time, labor on the court, and, worse yet, great danger of missing the real point or matter complained of as error. My conclusion is that, if the assignment of error or brief of counsel clearly and distinctly specifies the question refused or allowed,—the particular point complained of, with a specification of its place in the report of the proceedings,—this court ought to consider it; otherwise, not. This much ought to be required of the counsel who make the complaint, and who ought to put the finger on the points of complaint; he being well versed in the case, and knowing his grievance. Of course, if there is such specification embodied in the motion for a new trial, that will answer; but a mere general statement that the new trial is asked on the ground that the verdict is contrary to the evidence, or because of the admission of improper evidence, or because of the rejection of proper evidence, will not do. But what as to the circuit court? How is it to be protected from the obligation to wander through the great mass of proceedings in a long trial? The evil is not so great in that court, because the judge has witnessed the trial, made notes of the questionable points, and most likely in every case the particular points are specified at the bar by counsel on the motion for a new trial; and if not so specified, as they should be, the judge can demand that they be specified, if he feels the need of specification to refresh his memory and recall the particular points to his mind. There are numerous cases which, though not just on this point, yet show that all that should be required to save a party his point is that it shall definitely appear on the record what is the point aggrieving him, and that he saved his point, and did not waive it. *Hughes v. Frum*, 41 W. Va. 453, 23 S. E. 604; *Perry v. Horn*, 22 W. Va. 381; *Bank v. Showacre*, 26 W. Va. 48; *Sweeney v. Baker*, 13 W. Va. 158; *Wickes v. Railroad Co.*, 14 W. Va. 157.

Following this ruling, the assignment of error points out that witness Scott was asked, if a map was correctly made



## Kay v. Glade Creek &amp; R. R. Co

of the location of the railroad, to tell the jury what damages

Mrs. Kay sustained by reason of the road, and was allowed to answer, over objection, that he understood that he "should take into consideration all the damage to Mrs. Kay's property

**Eminent Domain  
—Damages—Dan-  
ger from Fire  
from Locomo-  
tives.**

that would originate from this road, and not the damage to the tract generally." The objection is stated to be that the witness was valuing damage to the property that had been done, and what might be done in future, from fires that might happen. I think this specification is sufficient, under the principles above stated, to call upon us to consider the point; and this involves a very important question, which, so far as I know, remains undecided in this state, and that is whether, in assessing compensation in condemnation proceedings, or in an action like this, for damages for taking land and using it for railroad purposes, other than that condemned therefor, danger from future fires caused by the locomotives on the road can be considered. The authorities conflict. 3 Elliott, R. R. § 996 (a late and very able work on the subject), states the law to be that "the increased danger from fire emitted from the locomotives, the increased cost of insuring buildings and their contents, \* \* \* have been held proper subjects for compensation in damages." There is no doubt but that such is the preponderance of authority. Mills, Em. Dom. § 163, says: "Among the damages occasioned by the location of a railroad on a portion of land is the exposure of the crops and buildings on the land to fire, from the sparks emitted from passing trains. The apprehension of fire is an element of damages, notwithstanding the railroad company may be compelled by law to answer all damages, whether resulting from negligence or not. The owner may prudently insure, notwithstanding the liability of the company to pay damages. The adjacency of the road to the property is an increase of risk, and increases the cost of insurance. Increase of cost of insurance diminishes the value of the buildings. An action against a railroad company for damages caused by fire is a

## Kay v. Glade Creek &amp; R. R. Co

poor substitute for insurance. The owner may select his insurance company, but cannot select his railroad. The present value of a building for purposes of residence or for sale is diminished by the effect of a constant liability to fire on account of proximity to a railroad. The danger, to be considered, must be real and imminent, and will not be considered when buildings are at some distance from the railroad. If the danger is such as render it advisable to remove the buildings, the cost of removal is a proper subject of damages. A secretary of an insurance company can give an estimate of damages from the increase of the rate of insurance, and can also testify that his company had refused the risk on account of increased hazard. In some states the doctrine is denied, because of the uncertain and contingent nature of the damages, and because the railroad would be responsible for fires caused by negligence. Railroad companies are not responsible for accidental fires, unless guilty of some negligence, and it is not negligence to employ locomotives." Lewis, Em. Dom. § 497, says: "When a part of a tract is taken for railroad purposes, danger from fire to buildings, fences, timber, or crops upon the remainder, in so far as it depreciates the value of the property, may be properly considered. It is immaterial that the railroad company is made absolutely liable for all losses by fire which originate from the operation of the road, whether from negligence or otherwise. Such a liability would doubtless render the depreciation in value less than in cases where the company was liable only for fires resulting from negligence. It is to be borne in mind that compensation is not to be given for increased exposure to fire, nor for increased insurance rates, nor for probable losses by fire in the future for which no recovery can be had, but simply for depreciation in the value of the property by reason of danger from fire. The evidence should be limited to showing all the facts in regard to the situation of the property and improvements relatively to the railroad, and perhaps to showing the distance from the road to which the danger extends." Under these authorities, the

## Kay v. Glade Creek &amp; R. R. Co

question is, is the value of the property lessened by the reasonable apprehension of damage from fire caused by the operation of the road? And, if so, the amount of that depreciation. Note, however, that such danger must be such as, under all the circumstances, may be reasonably apprehended, not remotely chanceful or hazardous. The danger must be real, imminent, not mere possible danger. *Hatch v. Railroad Co.*, 18 Ohio St. 92; *Jones v. Railroad Co.*, 68 Ill. 380; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *Railroad Co. v. Waldron*, 88 Am. Dec. 116; *Colvill v. Railway Co.*, 19 Minn. 288 (Gil. 240); *Adden v. Railroad Co.*, 55 N. H. 415. In *Railroad Co. v. Ross* (Kan. Sup.) 20 Pac. 197, and in *Railroad Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15, the Kansas court held that, while danger from fire is to be taken into consideration as an element of damage, yet "it is competent only to take into consideration the risk of fire set out by the railroad company without its fault, and by reason of the operation of the road through the premises. For fires occurring by its negligence the company is liable in a proper action instituted therefor, and this element should not be taken into account in estimating the damages." This distinction seems to me reasonable. We must not anticipate the occurrence of fire from the misconduct and negligence of the company's employees; for that would be purely guesswork, speculative and not to be presumed, and until it occurs no damage results therefrom, and then the company is liable, whereas it may be reasonable to anticipate and expect fires damaging forests, houses, barns, and hay or wheat stacks, in times of drought, from the mere operation of the road, without negligence. We ought no more to anticipate negligence in the future from the operation of the road than we anticipate negligence in the improper construction of the road in assessing damages in condemnation proceedings, and such damages are never allowed. This railroad ran through timber lands of Mrs. Kay, and did set fire to fencing, and destroyed considerable fencing, and injured her timber. This had really

Kay v. Glade Creek & R. R. Co

happened, and therefore we can by no means say that evidence bearing on the question of damages from danger of fire in the future was improperly admitted.

Complaint is made that witness Scott was allowed to answer certain questions on a certain page of the stenographer's notes, and others "as shown in the record." I do not find the questions. The specification is too indefinite.

As to the complaint that evidence of John Dillon and others was improper: No point is specified, except the general one that they did not know what they were talking about, for want of knowledge. That was a question for the jury, as to the weight of the evidence, not a question of admissibility.

As to the complaint that the jury disregarded the award made by arbitrators as to the damages: The award is lost from the record. Moreover, it was not binding on Mrs. Kay, as no evidence is shown of authority on the part of her husband to sign it for her, and it was never carried into judgment.

As to the complaint that there was no evidence to show that the fire that burned fencing and damaged timber came from the defendant's locomotive: Turner Ransom's evidence was before the jury, and, to say the least, was some evidence on the subject; and we cannot set aside the verdict for that cause. I think it is enough to fairly impute the fire to the locomotive of the company. The jury passed on the question of negligence. If anything was allowed on that score, it is probably under \$100; and, therefore, if there were error in that, that alone would not justify reversal.

As to the refusal to allow Carpenter to answer the question first asked on page 83 of stenographer's notes: The original notes are not before us. The specification is too indefinite. If it refers to what Kay said, there is a want of authority to bind his wife to his declaration.

As to the refusal to allow Wright to answer the question, "What did William Kay tell you, at the time this award was

## Kay v. Glade Creek &amp; R. R. Co

made by the arbitrators, in regard to it?" There is no authority in Kay shown, to bind his wife.

As to striking out the answer of Boxley, on page 102 of stenographer's notes, not before us: Guessing at it, he says that Carpenter and Wright were to meet, to go over the line and get Kay to consent to the construction of the road, but failed to do so, and he then agreed that the construction should be proceeded with, and, if they could not agree on the compensation, the matter should be arbitrated. How does the exclusion of this answer prejudice the defendant? It only shows the agreement of the husband to arbitrate, and his authority to do so is not shown. Suppose the plaintiff had agreed to do so, but failed to finally agree to it; it would not preclude this action.

As to the refusal to allow Scott to answer certain questions: They are not sufficiently specified, under above principles. I am not sure that I could find them, except by guesswork.

In addition, as to all these questions which the court refused to allow to be answered, they cannot be considered, for the reason that the answers are not given, nor is it stated what was expected to be proven by the answers. How can we say what the answers would be,—material or immaterial, relevant or irrelevant? We cannot say the party is aggrieved by the refusal. In *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575, is the syllabus: "Where a question is not allowed to be answered by a witness, and it does not itself import that its answer will prove a fact material, and it does not otherwise so appear, the refusal to allow it to be answered will not be ground of reversal." In *Childress' Adm'x v. Railway Co.*, 94 Va. 186, 26 S. E. 424, the rule of practice is stated to be that if an exception for allowing or refusing to allow a question to be answered by a witness "fails to give the answer of the witness, or what is expected to be proved by him, the appellate court cannot determine the relevancy, admissibility, or value of the answer, and the

Appeal—  
Review.

## Kay v. Glade Creek &amp; R. R. Co

exception will not be considered." The same is held in *Insurance Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, and *Kimball v. Carter*, 95 Va. 77, 27 S. E. 823, 38 L. R. A. 570, and *Railway Co. v. Reiger*, 95 Va. 418, 28 S. E. 590, and *Beirne v. Rosser*, 26 Gratt. 537.

The last ground of complaint against the judgment is that the verdict for \$1,000 against the company is excessive. I cannot myself help saying that, from what I can glean from the cold paper view of the case, I regard the verdict as high and onerous in amount,—beyond just compensation. The company occupies 3.78 acres of the plaintiff's land, all in woods, on a steep mountain side, very, very rough; of almost no value for farming purposes; placed by most of the witnesses at low value,—one of the most intelligent of plaintiff's witnesses putting it at \$4 or \$5 per acre. For that land, of course, the plaintiff must have pay, but I can hardly see, on the evidence, that the residue of the land is not worth as much for all purposes as before the railroad went there; and that is the test. *Board of Education v. Kanawha & M. R. Co.*, 44 W. Va. 71, 29 S. E. 503. But I may be wrong in this conception, and that I am wrong is attested by the verdict of 12 men, approved by a competent circuit judge, all of whom were present, and experienced the practical showing of the trial, and are more competent to judge than I am from mere paper. And I must not forget or disregard very material evidence entering into this question of damages. The plaintiff's claim is that from the construction of the road on her land on the steep mountain side, by making a switchback, her land is cut up and separated, and deep cuts have been made, and thereby outlet for her timber, as well as coal, has been destroyed; that rocks and other debris from coal mining have no place of deposit on the steep mountain side, but would slide into the railroad; and that there is no place for loading the coal or timber, and it cannot be got out, except with expensive structures. If this be so, of course the damage is serious, and there was very con-

Eminent  
Domain—Dam-  
ages—Opinion  
Evidence.

## Kay v. Glade Creek &amp; R. R. Co

siderable evidence to show this. Evidence on the plaintiff's side fixes the maximum damage at \$1,300, and on the defendant's side at practically nothing. In truth, the valuation is mere matter of estimate or opinion on both sides. Opinion evidence, however, is in such cases admissible,—in fact, in most cases controlling, in connection with the facts and circumstances. *Blair v. City of Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852; *Railroad Co. v. Foreman*, 24 W. Va. 662; *Hargreaves v. Kimberly*, 26 W. Va. 797. A farmer not knowing the market value of real estate, not living in the neighborhood of the particular land, and who does not know its situation, fertility, advantages, and disadvantages, cannot give his opinion as to the value of the land before and after the appropriation of the right of way by a railroad company, as it is not a question of expert evidence; but a farmer conversant with the land, as to its situation, soil, advantages, etc., may state the facts, circumstances, and respects in which the land is benefited or injured, and in connection therewith may state his opinion of the value of the land before, as compared with its value after, the appropriation of the right of way by a railroad company. He may not express his mere naked opinion of the amount of damages caused by the work, but must state his opinion of the value of the land before and after the construction of the railroad, in connection with the facts and circumstances relative to the land flowing from the construction of the railroad. Where the law fixes a standard of estimation of damages, and a jury departs from it, the verdict must be set aside; but I do not see that such is the case in this instance, and therefore the court cannot interfere with the verdict of the jury, unless it be so large or small as to enforce upon the court the conviction that the jury acted under impulse of some improper motive or some gross error, or a misconception of the subject. *Railroad Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Railroad Co. v. Nighbert*, 46 W. Va. 202, 32 S. E. 1032. These views result in the affirmance of the judgment.

Seattle & M. R. Co. Corbett

SEATTLE & M. R. CO.

v.

CORBETT.

(*Supreme Court of Washington, Feb. 20, 1900.*)

**Eminent Domain—Compensation—Structures by Railroad Prior to Condemnation.\***—A railroad condemning land previously appropriated by it, and upon which it had erected structures, cannot be required to pay the value of such structures as part of the compensation for its condemnation.

**APPEAL** by plaintiff from Snohomish county superior court. *Modified.*

*Burke, Shepard & McGilvra*, for appellant.

*O. P. Mason and J. R. Cunyningham*, for respondent.

GORDON, C. J. In June, 1891, the Seattle & Montana Railway Company took possession and constructed its railroad over and across respondent's property in Snohomish county, the amount of the land so appropriated being 8.50 acres. In May, 1898, the appellant herein succeeded to the interest of the Seattle & Montana Railway Company, and in February, 1899, instituted this proceeding in the superior court of Snohomish county for the purpose of condemning the premises in question, which, as hereinbefore stated, had prior thereto been appropriated by its predecessor. The court, having found that the premises were requisite and necessary for the railroad enterprise, proceeded, without a jury, to the ascertainment of damages, and found that the value of the land taken was \$170, and the value of the rails, ties, bolts, fish plates, etc., placed upon said land by the railway company was \$2,500, and thereupon gave judgment against the company for the sum of \$2,670. The railroad

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\*See 11 Am. & Eng. R. Cas., N. S., 569 *et seq.*, note.



Seattle &amp; M. R. Co. Corbett

company appeals, and assigns as error the inclusion in the judgment of the value of the rails, ties, bolts, fish plates, etc.

A similar question was presented and passed upon by this court in *Railroad Co. v. Strand*, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238. In that case the railroad company had built two small buildings or cottages upon the premises, which it thereafter sought to condemn, and their value was separately found by the jury, and included in the judgment. We reversed the judgment for that reason. The question is not controlled by the rule of the common law, under which structures erected by tort feorsors become part of the real estate. Unlike tort feorsors, at common law the railroad possessed the power to condemn and acquire title, the condition upon which it might do so being that it should make just compensation; and it would be monstrously unjust to hold that it should be required to pay the value of the improvements which it had placed upon the land prior to its acquisition. The law upon the subject is well settled, and the question does not justify extended discussion. *Justice v. Railroad Co.*, 87 Pa. St. 28; *Railroad Co. v. Dickson*, 63 Miss. 380; *Railroad Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Railway Co. v. Mosier (Or.)*, 13 Pac. 300; *Lyon v. Railway Co.*, 42 Wis. 538; *Railroad Co. v. Heeser (Cal.)*, 24 Pac. 288; *Railway Co. v. Adams (Fla.)*, 10 South. 465. The cause must be remanded, with directions to the lower court to modify its judgment by eliminating therefrom the value of the rails, ties, bolts, fish plates, etc. The appellant will recover the costs of this appeal.

DUNBAR, REAVIS, and FULLERTON, JJ., concur.

Austin v. Augusta T. Ry. Co

AUSTIN

v.

AUGUSTA T. RY. CO.

(*Supreme Court of Georgia, Aug. 2, 1899.*)

**Eminent Domain—Elements of Damage—Construction of Constitutional Provision.**—In that clause of the constitution providing that "private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid" (Civ. Code, § 5729), the word "damaged" is used in its usual sense as a law term, and does not change the substantive law of damages, or create a cause of action where none previously existed; nor does it abrogate the principle expressed in the phrase, "*damnum absque injuria*," but it does preserve all existing causes of action for damages to private property, and prohibit exemptions of liability for such damages, even if occasioned by public uses.

**Same—Same—Same.**—The word "damaged," in this clause, refers to "actionable wrongs," and does not require compensation for depreciation in the value of private property caused by the lawful operation of a public work owned by a corporation vested with the power of eminent domain, unless a private corporation or private individual would be liable for similar acts under like circumstances; nor is a *quasi* public corporation liable where private property is depreciated in value as a result of the lawful use and enjoyment of the company's private property.

**Same—Same—Same—Must Be Physical Interference.\***—To "damage" property, within the meaning of the constitution, there must be some physical interference with property, or physical interference with a right or use appurtenant to property; and therefore a railway company is not liable to the owner of real property for diminution in the market value thereof, resulting from the making of noise, or from the sending forth of smoke and cinders, in the prosecution of the company's lawful business, which does not physically affect or injure the property itself, but merely causes personal inconvenience or discomfort to the occupants of the same.

(Syllabus by the Court.)

Though, by the introduction into the constitution of this state of the words "or damaged" in the clause thereof quoted in the first of the pre-

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\*See note at end of case.

## Austin v. Augusta T. Ry. Co

ceding notes, nothing may have been made actionable which was not so at the common law, it does not follow that a railway company is not liable to an owner of land for causing a diminution in the market value of the same by the making of deafening noises, or the sending forth of vast volumes of smoke and cinders, or by causing the walls of a building to vibrate and crack, notwithstanding these things may have been necessary to the legitimate prosecution of the company's lawful business. Such acts, if they have the effect indicated, are physical invasions of and interferences with the property rights of the owner of such land. Per LUMPKIN, P. J., and LEWIS, J., dissenting.

ERROR by plaintiff from Richmond city court. *Affirmed.*

*Boykin Wright* and *F. W. Capers*, for plaintiff in error.

*J. R. Lamar*, for defendant in error.

SIMMONS, C. J. After this case had been regularly heard, it was ordered reargued on a question so framed as to embody the material points involved. An analysis of the evidence

is, therefore, not necessary, further than to  
*Case Stated.* explain the situation of the property and the claim of the plaintiff. Bay street, in the city of Augusta, is laid along the southern bank of the Savannah river. Cumming and McCartan streets run south from it, at right angles. The railroad runs down Bay past Cumming street. By a spur track, it crosses a lot owned by the company at the corner of Bay and McCartan streets, and thence runs across McCartan street into its freight yard. Plaintiff's lot does not touch Bay or McCartan street, but abuts on Cumming street; the Goodrich lot intervening between her premises and Bay street, along which the track is laid. Plaintiff's lot corners on land belonging to the company, upon which one track has already been laid, and the plats in evidence show that other tracks are to be laid thereon in the future. The lot, with improvements, cost \$3,500, and was returned for taxes at \$2,500, before and after the road was built. After the road was in operation, plaintiff demanded \$5,000 as the price at which she would sell the property to the company. In spite of this demand and valuation, the witnesses varied

*Austin v. Augusta T. Ry. Co*

in their estimate of damages from 10 per cent. to 60 per cent. on the original cost; all of them stating that, in their opinion, the depreciation in value was caused mainly, if not exclusively, by the movement of cars in the freight yard, on the square across McCartan street, and distant some 200 feet from plaintiff's lot. Petitioner also claims damages for laying the track and operating the cars in Bay street, and there was absolutely no evidence that she ever used Bay street, or that her means of ingress and egress had been interfered with in the slightest degree. Plaintiff's husband testified that he "noticed cracks, which he considered the result of vibrations," but this was the only allusion thereto, and no evidence was introduced as to the amount of damage occasioned by these cracks, or by any other one item of damage relied on by the plaintiff. Had she been entitled to recover for any specific act, it would have been impossible for the jury to have measured the amount, or to have rendered a proper verdict. All of the estimates were in a lump, besides being based principally on the result of operating the cars in the freight yard. All immaterial matters being eliminated, claims not supported by the evidence being excluded, and the record showing that in the construction of the road no property of plaintiff was taken, nor were her premises damaged by reason of any means of access, right of way, or easement, remote or near at hand, being physically interfered with, invaded, or disturbed, the court finds that the record requires an answer to this question: "Is the railway company liable to the owner of real property for the diminution in the market value thereof, resulting from the making of noise, or from the sending forth of smoke and cinders in the prosecution of the company's lawful business, which do not physically affect or injure the property itself, but merely cause personal inconvenience or discomfort to the occupants of the same?"

Plaintiff insists that, as the market value of her lot had been diminished in consequence of the operation of the railroad, she is entitled to recover therefor, by virtue of the

## Austin v. Augusta T. Ry. Co

provision in the constitution that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." Civ. Code, § 5729.

**Eminent Domain—Elements of Damage—Construction of Constitutional Provision.**

In a popular sense, the word "damage" does frequently mean depreciation in value, whether such depreciation is caused by a wrongful or a lawful act; but in statutes or other legal instruments giving compensation for "damages" the word always refers to some actionable wrong,

**Same—Same—Same.**

—some loss, injury, or harm which results from the unlawful act, omission, or negligence of another. In this sense, and as a well-defined law term, it was used in the constitution, to give the owner of private property compensation for the actionable wrong whereby his property had been damnified; but it did not give him compensation for depreciation in value caused by any legal act, since in law such an act was innocent, and therefore harmless, or, if not actually harmless, "*damnum absque injuria*." There is nothing in the language of the constitution, or in the debates, or in the proceedings of the convention, which shows any intent to enlarge its definition, or to make it mean more than it had always meant as a law term. Nor was this sentence framed with a view of changing the substantive law of damages, or of making that actionable which before that time had been nonactionable. Rather the purpose was to make the law of damages uniform, so that a plaintiff could recover against a city or railroad under the same circumstances that would have authorized a recovery against those not armed and protected by the power of eminent domain. For example, if, prior to 1877, a manufacturing company had obstructed a street, and thereby inflicted special damages, a property owner so injured could recover; but if identically the same act had been done by a municipality under its charter, it would have been just as much "damage" though the property owner could not recover, because the state's license to obstruct the street was authority for what had been done,—a shield and protec-

Austin v. Augusta T. Ry. Co

tion affording immunity from what would otherwise have been liability. In both instances it "damaged" the property, because, while it did not "take" the corpus of the estate, it yet physically interfered with an easement or right of way appurtenant to the lot. But in the one case he could recover; in the other he could not. The constitution intended to take away the city's exemption, and to leave it and the manufacturing company on an equal footing, ordaining that thereafter "damages," by whomsoever caused, and even if for public purposes, should be paid. But they must be "damages" in the sense in which that word is used and applied in courts. Thereafter, what is damage by one is damage by all; and likewise what is *damnum absque injuria* to one is so to all. If one landowner diminishes the market value of his neighbor's house by cutting off light and air therefrom, he is not required to make good the depreciation. He had a right to build the wall, and, legally speaking, he has not "damaged" his neighbor. So, too, if a city should erect a public building, or a railroad put up a warehouse, and cut off the same easement of light and air, neither would they be liable, for they had the same right to build, and neither had they "damaged" the adjoining lot owner.

The elaboration of this point is necessary, as the plaintiff insists that the use of the word "damaged" in the constitution gives her a new right,—a cause of action where none would otherwise have existed; and that wherever and whenever there is depreciation in value of real estate as the result of constructing or operating works intended for public use there is damage within the meaning of the constitution,—citing cases from Nebraska, Texas, and Illinois in support of her right to recover. The constitution of those states may use the word "damage," or its equivalent, but the language thereof is not identical with ours. Then, too, the facts in those cases are somewhat different. But, even if the reasoning and conclusions are conceded to be contrary to the views just expressed, it is an altogether sufficient

*Austin v. Augusta T. Ry. Co*

answer to say that those cases are distinctly and avowedly opposed to the current of authorities as found in the decisions of England, Massachusetts, New Jersey, Pennsylvania, West Virginia, Missouri, Minnesota, and Colorado, and to our own cases of *Peel v. City of Atlanta*, 85 Ga. 138, 11 S. E. 582, 8 L. R. A. 787, and *Mayor, etc., v. Sikes*, 94 Ga. 30, 20 S. E. 257, 26 L. R. A. 653, each of which announces that the introduction of the word "damage" only makes the company liable to the same extent as an individual would have been at common law. We will consider these cases somewhat at length: The Missouri constitution provides for payment where property is taken or damaged. Const. art. 2, § 21. *Rude v. City of St. Louis*, 93 Mo. 408, 6 S. W. 257 (cited in the *Peel Case*), holds that by the use of the word "damage" the constitutional convention expressed an "intention to require compensation in all cases where, but for some legislative enactment, an action would lie at common law." A New Jersey statute authorized the building of a bridge upon payment of damages to such owners of bridges as might be injured. The court says: "These compensation clauses do not create any new right, their purpose being simply to preserve the common-law right of the person injured. If a railroad does an act injurious to another, which at common law would not be actionable, such person so injuriously affected cannot obtain redress by force of the clause under consideration." *Bridge Co. v. Geisse*, 35 N. J. Law 558, following the English cases. In *Jordon v. City of Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, citing and following *Mayor, etc., v. Sikes*, 94 Ga. 30, 20 S. E. 257, 26 L. R. A. 653, the court says: "The provision of the constitution that private property shall not be taken or damaged for public use without just compensation does not render a city liable for damages from surface water, where a private individual would not be liable. \* \* \* It was not designed to be put upon the state, or upon counties or municipalities,—subordinate parts of the state government,—a burden not resting on private

## Austin v. Augusta T. Ry. Co

corporations under the same circumstances." If, then, the constitution uses the word "damage" as a legal term, and as the equivalent of actionable wrong; if it does not repeal the principle expressed in the phrase "*damnum absque injuria*"; if it does not create a new cause of action,—it remains to determine whether the plaintiff has been "damaged" within the legal meaning of that word. According to the record, the defendant has not done any wrongful or unlawful act. It took no property; it invaded no right; it obstructed no way; it interfered with no easement or appurtenance, remote or close at hand. The diminution in value was caused by the lawful operation of defendant's cars on its own private property. A depreciation similar in kind, possibly equal in degree, might have been caused if police barracks or a jail had been erected in the near vicinity; and yet, according to the Pause Case, 98 Ga. 98-100, 26 S. E. 489, this would have been *damnum absque injuria*. If a great manufacturing plant had been erected on the adjoining lot, the market value of plaintiff's house might have been greatly injured, no matter how silent the operations of the mill. Properly conducted, decently appointed, and orderly managed stores, shops, factories, and business houses erected in close proximity to residential quarters frequently cause great depreciation in values. In the popular sense, they cause damage. But in such cases the annoyances—the inconveniences—occasioning the loss in value are not actionable, because they arise from lawful uses. The owners of these establishments are as much entitled to the use and enjoyment of their property as is the owner of the residence property reduced in value by their presence. The first occupier of land does not acquire the right to prevent his neighbor from erecting walls, digging excavations, erecting buildings, or engaging in manufacturing or mercantile business thereon, no matter how seriously such acts may depreciate the market price of adjoining property. If the acts complained of do not amount to a nuisance, there is neither legal nor moral wrong done to the plaintiff.



*Austin v. Augusta T. Ry. Co*

The framers of the constitution knew that railroads would take private property, would damage private property, and would annoy and inconvenience the holders of private property. For the first two of these consequences they provided a remedy. They could have done so as to the third. But they did not use the apt words to show that such was their intention. On the contrary, the guaranty of compensation was restricted to damages to property, not damages to person. They not only used a word which meant actionable wrong, but was identical with that already construed in Massachusetts, and the equivalent of "injuriously affected," which at that time had been finally construed, under the English condemnation acts, to require a taking or a physical interference with the land, or some right appurtenant thereto, in order to entitle the plaintiff to recover.

Inasmuch as no easement or other appurtenance belonging to the plaintiff was "physically interfered with," it is necessary to consider the cases which discuss the effect of that fact upon the right to recover. Under the old cases there had to be a physical taking; under the present constitution there must be a physical damage. The property need not abut on the street, or be immediately contiguous to the railroad. It may be at a distance from the point where the injury is occasioned, but it must appear that plaintiff has some right, some user, some interest, which has been wholly or partially destroyed before there can be a recovery. "There must be some direct physical disturbance of a right, either public or private, which plaintiff enjoys in connection with his property, and which gives to it an additional value, and by reason of such disturbance he has sustained a special damage." *Pause v. City of Atlanta*, 98 Ga. 98-100, 26 S. E. 489. These conclusions are fully sustained by decisions in Iowa, under a statute requiring payment for "injury to property abutting on the street" (*Morgan v. Railway Co.*, 64 Iowa 589, 20 Am. & Eng. R. Cas. 67, 21 N. W. 96); in *Gilbert v. Railway Co.*, 13 Colo. 501, 40 Am. & Eng. R.

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ference.

## Austin v. Augusta T. Ry. Co

Cas. 300, 22 Pac. 814 (where the constitution required payment for damages); in Minnesota, in the Rochette Case, construing the word "damages" (32 Minn. 201, 20 N. W. 140); in Massachusetts, where the statute required payment for "damage" (*Presbrey v. Railway Co.*, 103 Mass. 1); in New Jersey, where the statute required payment for "injury" (*Bridge Co. v. Geisse*, 35 N. J. Law 558); in Missouri, where the constitution uses the word "damage" (*Rude v. City of St. Louis*, 93 Mo. 408, 6 S. W. 257); in a number of most elaborately argued and carefully considered cases in England, where payment was required to be made for property "injuriously affected"; in Illinois, where the word "damage" is construed in the *Rigney Case*, 102 Ill. 64; in the able opinion of the supreme court of Pennsylvania in the *Lippincott and Marchant Cases*, 116 Pa. St. 472, 9 Atl. 871, 119 Pa. St. 541, 13 Atl. 690, affirmed in 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751; and, lastly,—and until reversed in the manner provided by law, conclusively for us,—in the *Pause Case*, 98 Ga. 100, 26 S. E. 489; *Campbell v. Railroad Co.*, 82 Ga. 320, 9 S. E. 1078; *Peel v. City of Atlanta*, 85 Ga. 138, 11 S. E. 582, 8 L. R. A. 787. "The damage must be to the land itself. \* \* \* Any other construction would open the doors to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature." *Ricket's Case*, L. R. 2 H. L. 198, cited in the *Peel Case*. "The effect upon land of the annoyance or inconveniences arising from the frequent passing of the trains over a street by which it is approached affords no ground for damage. \* \* \* Such depreciation is not occasioned directly by any effect on the land of which the construction or the maintenance of the railroad is the cause. One belongs to that class of results which necessarily arise from the exercise of the franchise granted. The annoyances to the landowner are the same in kind as those suffered by the whole community, and the fact that land lying near the railroad is thereby rendered less desirable for the erection of dwellings, and of less market value in consequence, does

*Austin v. Augusta T. Ry. Co*

not furnish an independent ground for the recovery of damages therefor." *Presbrey v. Railway Co.*, 103 Mass. 6. "The injury must affect some right held with regard to the property. The injury must be to the land itself; and mere personal obstruction, or inconvenience, or damage to the trade, although of such a nature that it might have been the subject of an action, would not entitle the party injured to compensation. \* \* \* The injury must not be of a personal character, but must be to the land, considered independently of any particular trade. There must be a physical interference as opposed to interference of a mental nature or of an inferential kind. \* \* \* The word 'physical' is here used to distinguish the case from that class of cases where the interference is not of a physical, but rather of a mental, nature, or of an inferential kind." *Board of Works v. McCarthy*, L. R. 7 H. L. 256. There is here a clear indication that the annoyances from smoke and noise are of a mental nature. While in *Railway Co. v. Brand*, L. R. 4 H. L. 171, the plaintiff was denied damage for noise and vibration, occasioned without negligence, by the passing of the trains over the railway, for the construction of which no part of the land was taken; and while in *Railway Co. v. Hunter*, L. R. 2 H. L. Sc. 78, compensation for noise and smoke was denied for the same reason,—the result would have been different if there had been a physical interference, or if the land, or some right appurtenant, had been invaded for railway purposes. *Duke of Buccleuch v. Board of Works*, L. R. 3 Exch. 306. And by the case of *Ricket v. Railway Co.*, L. R. 2 H. L. 175, approved and followed in *Peel's Case*, 85 Ga. 141, 11 S. E. 582, 8 L. R. A. 787, the rule was finally settled that the injury must affect some right held with regard to the property, and personal inconvenience was not a sufficient basis for compensation. And in the *Rude Case*, *supra*, under the Missouri constitution, which uses the word "damage," it is said, "There must be some physical disturbance of a right \* \* \* to entitle the property holder to recover." The Georgia cases are in perfect har-

*Austin v. Augusta T. Ry. Co*

mony with these authorities, and distinctly rule the question involved in this case. In fact, it would be necessary for this court to overrule the *Pause* and *Peel* Cases in order to reach the conclusion that the plaintiff could recover. And it will be found that in every decision by this court where a plaintiff was held entitled to recover for damages occasioned by works for public use there was always some physical interference with an easement, right of way, obstruction of the street near the premises, or some direct invasion of an appurtenance connected with the land. And in the many cases from other states, where the effect of smoke, noise and cinders was considered, it will be found that the suit was by the owner of abutting property which had been damaged by change of grade, obstruction in a street, an actual taking of a part of the land, or the maintenance of a nuisance. In *Bacon v. Walker*, 77 Ga. 339, a bill was filed to enjoin the erection of a jail on private property belonging to the county, for the reason that it would create a nuisance, produce irreparable injury, and damage private property without compensation. The court say: "This is not such a case as would be the change in the grade of a street and damage therefrom. The streets are under the government of the city, but all living upon them are interested in them for thoroughfares. The street is not the absolute property of a city, like the lot belonging to a county, on which a jail is erected; and the incidental damage done by its erection to the taste and sensibility of the residents around is too uncertain and remote to be considered damage in the sense of the constitution. It is in connection with taking private property that 'damaging' it is used in the constitution." It is intimated in the *Rigney* Case that under the old rule damages were limited to "taking" the corpus of property, while the use of the word "damage" enlarges the liability so as to allow damages for something besides a direct physical injury to the corpus. But it is clear that it was not intended to reach every possible injury which is necessarily incident to the ownership

## Austin v. Augusta T. Ry. Co

of property in towns and cities, which directly impairs the value of private property, for which the law does not, and never has, afforded any relief. \* \* \* Building of a jail, police station, will cause direct depreciation in the value, yet it is clearly a case of *damnum absque injuria*." Rigney v. City of Chicago, 102 Ill. 64, followed in the Pause Case. In the Elevated Railroad Cases, damages from smoke and noises were allowed to abutting property owners. But the structures in the street physically invaded the owner's easement of light and air, as well as interfering with his means of access to his premises. But in no cases has the owner of property on a cross street or a parallel street, no matter how close to the elevated road, been held entitled to recover, so far as we have found; and yet it is almost certain, as a business proposition, that persons owning property abutting on cross streets have found their property depreciated in value as a result of the construction and operation of the elevated roads. In our own case of Railroad Co. v. Steiner, 44 Ga. 546, the tracks were in the street immediately in front of the plaintiff's residence, physically invading his right of way, and thereby giving him a cause of action. When there has been this physical interference, there is a "damage" in connection with the "taking" of the private property consisting of an easement or right of way, and the plaintiff, being thus damaged, is allowed to show all of the elements of that damage. The effect of smoke and noise are considered, not as independent elements of damage, but as tending to prove the value of the property after the said railroad has thus taken or damaged the property, or some right appurtenant to the property. Bacon v. Walker, 77 Ga. 339; Chapman Case, 88 Ga. 770, 15 S. E. 901, 17 L. R. A. 430. There must be damage coupled with a wrong to give a cause of action. For a physical invasion or wrongful interference with property or its appurtenances, resulting in damage, the plaintiff may recover. Without some wrongful act on the part of the defendant, she cannot recover, even though there is deterioration in the value of her property.

*Austin v. Augusta T. Ry. Co*

Considering the language of our constitution, and our own decisions, and this array of authorities, we cannot follow the cases cited by plaintiff in error, particularly as the case from Illinois seems to us in conflict with the Rigney Case, which has been generally approved by other courts, and by this court in the Pause Case. The last of these cases, decided by the supreme court of Illinois in 1896 (*City of Chicago v. Union Stock-Yard & Transit Co.*, 45 N. E. 430), held that the transportation of cattle through the streets created a serious public nuisance, for which reason the city had attempted to have the tracks removed. In denying the right of the city so to do, the court says: "It cannot, of course, be claimed that the city may compel the removal of all railroad tracks from the public streets because those who live near the tracks are disturbed by those annoyances incident to the operation of all railroads. As was said in *Chicago, R. I. & P. R. Co. v. City of Joliet*, 79 Ill. 25, and *Railroad Co. v. Grabill*, 50 Ill. 244, 'such consequences of the construction and operation of railroads must be borne by all living near them without complaint, and without hope of redress, for they are inseparable from the purposes and objects of such structures.' " Irrespective of all the authorities cited, there is a view of this question arising out of the very language of the constitution itself, which lends great weight to that construction which limits the damages recoverable to those arising from taking the land (*Bacon v. Walker*, 77 Ga. 339), or physically interfering with some right appurtenant thereto, excluding those which flow from the operation of the road. It is true that the requirement that damages shall be first paid was intended primarily for the benefit of the landowner. But the word is there not only for that purpose, but for all else it means when the sentence is read. And if, in requiring damages to be first paid, the constitution defines as the damages to be paid those which can be assessed and measured before the road is built, the conclusion is irresistible that the constitution guaranties payment of those direct, immediate injuries which certainly, directly, and inevitably

*Austin v. Augusta T. Ry. Co*

flow from the construction of the railroad, highway, or other public works. If a street is laid out, no private property may be taken, and none may be damaged. Can it be that, as travel increases, and with it the bustle and noise and dust arising from the use of the streets by drays and wagons, the municipality can be called on to compensate the property holder who shows that, while he was not damaged by the construction of the street years before, the increased noise and dust have depreciated the market value of his residence? These annoyances flow from the operation of the street, and a city would be liable therefor, if, under like circumstances, a railroad is liable for the diminished value of near-by property, caused by the noise and smoke arising from the operation of the road. When no property is taken for laying out a street or building a railroad, it is not at all certain that the operation will cause depreciation, nor, if so, when and to what extent. That necessarily depends on the character of the vehicles used, as well as the extent of travel on the highway or the railway. Such depreciation may never come; it may come soon; it may be delayed for years. When it does come, it may be more, and it may be less. If plaintiff is entitled to compensation for the inconveniences and annoyances arising from smoke, then the amount of smoke is an important factor in the calculation. But that depends not only on the amount of business and character of machinery, but on the quality of fuel used. Will it be hard coal, soft coal, or wood, or will these be varied from year to year, or will the company use animal power or electricity? The amount of noise will depend on the kind of engines and cars, and be largely influenced by the amount of business. And the amount of both noise and smoke reaching the plaintiff's premises will be lessened by the erection of buildings between it and the freight yard, and increased if such structures should burn down. In the first place, the market value may not be depreciated at all by these influences; and to attempt to say that it will be depreciated when the fact may turn out to the contrary, and then to say when and for how long the depre-

## Austin v. Augusta T. Ry. Co

ciation may exist, and next to determine how much these indefinite and fluctuating elements will affect the market price, is to "multiply uncertainty by uncertainty." And this view has been announced in the *Marchant Case*, *supra*, where the court said: "The constitutional provision was only intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged, for the reason, among others, that it requires payment to be made therefor, or security to be given, in advance. This is only possible where the injury is the result of construction or enlargement, for how can injuries which flow only from the future operation of the road, and which may never happen, be ascertained in advance, and compensation made therefor?" Our general condemnation law, as found in the Civil Code, also shows that the damages, both direct and consequential, which are recoverable, are those arising from the construction of the works, from some visible and physical interference with a specific piece of property, or with some specific right or use connected therewith, and capable of exact description; for the company is required to notify the owner what property or easement or franchise it proposed to take or damage. Civ. Code, § 4658. The contention of the plaintiff would lead to the conclusion that every one within the circle affected by noise or smoke was entitled to notice, though it would be impossible to say how far that circle might extend before the road was constructed, or how far it might be enlarged or diminished after the road was in operation; and that each member of the community could recover his share for this public annoyance, though the rule is that for public annoyances and inconveniences one property holder has no cause of action. "The property must be depreciated in value by being deprived of some right or user or enjoyment growing out of and appurtenant to his estate as a direct consequence of the construction of the public improvement." *Pause v. City of Atlanta*, 98 Ga. 98-100, 26 S. E. 489. "It is in connection with taking private property that 'damaging' it is used in the constitution." *Bacon v.*



Austin v. Augusta T. Ry. Co

Walker, 77 Ga. 339. We understand it to be conceded that, according to our own cases and the weight of authority, there must be some physical interference with property, or with property rights, in order to recover. But it is claimed that noise and smoke amount to such physical invasion; if so, a recovery may be had for slight noises, or for insignificant particles of smoke. True, the damages in such cases may be only one cent; but, inasmuch as no one has the right to physically invade the property of another, there can always be some recovery, no matter how insignificant or harmless the invasion may be. For a harmless, but unlawful, invasion in trespassing upon land by walking across a field a plaintiff could always recover at least nominal damages. It is an unlawful invasion. And, if noise and smoke amount to a physical invasion, a plaintiff would have the same right to recover for the nominal damages occasioned thereby. Yet we apprehend that no one would claim there could be a recovery for such physical invasions by harmless noise and barely perceptible smoke, and for the reason that noise and smoke do not physically invade a right of property. If, then, the liability for damages caused by smoke and noise cannot be based upon the theory of a physical invasion, it must be governed by the law of nuisance. And many and conclusive authorities may be cited to establish that a plaintiff can recover damages caused by noise and smoke sufficient in volume to amount to a nuisance; but noise and smoke *per se* give no cause of action. As noise and smoke affect the eye, ear, or the sense of smell, they would seem materially to be included among annoyances and inconveniences to person, rather than injuries to property. *Mygatt v. Goetchins*, 20 Ga. 358; *Railroad Co. v. English*, 73 Ga. 366. They do not seem to be treated as technical trespasses against property. *Wood, Nuis.* p. 107, 26 Am. & Eng. Enc. Law 570. If they be injuries to persons, of course they are not included within the provision of the constitution as to the payment of damages to property. It is, however, unnecessary finally to determine here whether they are

Austin v. Augusta T. Ry. Co

wrongs against person or property, or both, for in either case it must be admitted that smoke and noise give rise to no cause of action unless they create a nuisance. If, then, a recovery is dependant upon proof of the existence of noise and smoke sufficient to create a nuisance, the law applicable to nuisances must be enforced. While the state primarily owns the highway, and can authorize the use thereof by railroads, and thereby legalizes what would else be a nuisance in the streets, many courts have doubted whether any charter could legalize a nuisance which damages private property. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 332, 2 Sup. Ct. 719, 27 L. Ed. 739; *Burrus v. City of Columbus*, 105 Ga. 45, 31 S. E. 124; *Railroad Co. v. Cox*, 93 Ga. 561, 20 S. E. 68. And where a party is convicted of maintaining a nuisance, the judgment may direct its abatement (*Vason v. Railroad Co.*, 42 Ga. 637), and the same may often be done in a suit for damages, or proceedings for injunction (*Wood, Nuis.* p. 876; *Mayor, etc., v. Harris*, 75 Ga. 772 [Syl., point 2]). In fact, the law always contemplates that a nuisance is to be abated. The payment of damages is generally a mere solatium for past injuries, not an authority to continue the wrong; and often "persons who come to the nuisance" are entitled to damages, and sometimes to an injunction. *Railroad Co. v. English*, 73 Ga. 366, 16 Am. & Eng. Enc. Law, p. 934. In many cases neither prescription nor the statute of limitations affords protection to the party maintaining the nuisance. *City Council of Augusta v. Lombard*, 101 Ga. 727, 28 S. E. 994. We do not say that any one maintains these views, but, if a railroad is a nuisance, we would be logically driven to apply to such cases the law of nuisance, and, on the theory that nuisances cannot be legalized, the judgment would not only include payment for past damages, but provide for an abatement. The courts would have to enforce the principle that for successive nuisances there can be successive liabilities, and deny any defense based on prescription or the statute of limitations. So that, where a road has been built since 1877, if a citizen should

*Austin v. Augusta T. Ry. Co*

thereafter build within reach of the noise, smoke, and vibrations, and his house be thereby rendered less convenient—less valuable—than it otherwise would have been, he could recover for such diminution in value.

We must not lose sight of the fact that there is no hard and fast line separating lawful from unlawful occupations. Society adjusts itself to changed conditions, and so does the law. Cutting down timber was waste at common law. The conditions in this country were exactly reversed, and clearing up land in many instances was regarded as an improvement, rather than waste. The easement to light and air was a valuable property right in England; but without the aid of statute, and to meet a wise public policy, the doctrine of ancient lights has been practically abandoned in a country which was more interested in encouraging the building of new structures than in preserving the right of one owner to light and air coming across his neighbor's lot. There are thousands of factories, mills, furnaces, and other plants in this country about which no complaint has ever been made in the courts which would have been considered nuisances according to the old view of such structures. Yet around them, as around railroads, densely populated cities have grown, demonstrating that, instead of being harmful and injurious nuisances, they are exactly the opposite. Yet, if nuisances, persons who come thereto, and build near by, can have them abated, to the destruction of the community depending upon their existence for support. A rigid enforcement of rules and definitions announced in an age that knew nothing of locomotives and blast furnaces would have stopped the wheels of commerce, put out the fires of furnaces, and silenced the rattle of manufactories. When, therefore, we see houses being built close to the line of railways, and the very building of these houses changing the farm into a village and the village into a city; when, as said by JUDGE McCAY (*Railroad Co. v. Cohen*, 50 Ga. 462 [3]) in a street-railroad nuisance case, "all experience shows that cities are every day more and more anxious for them"; when we see

Austin v. Augusta T. Ry. Co

that people ride on railroads, sleep in their rapidly moving cars, and voluntarily build and live, in city and country, near the line where cars move day and night,—we are forced to hold that they are not nuisances, despite the frequent inconvenience and annoyance caused by their lawful operation. This line of reasoning is fully borne out by the case of *Ruff v. Phillips*, 50 Ga. 133, in which the court goes further, even, than we might be personally willing to follow. A similar line of reasoning was adopted in an earlier case in this court, where, speaking on an application to enjoin the building of a steam planing mill, CHIEF JUSTICE LUMPKIN said that it would not be a nuisance. "The only sense it will offend will be that of hearing. And we know of no sound, however discordant, that may not, by habit, be converted into a lullaby, except the braying of an ass, or the tongue of a scold. \* \* \* All persons purchase town lots in view of the possible purposes to which they may be appropriated. And if it be true that the risk from exposure will increase the insurance, it cannot be denied that it will be more than counterbalanced by the enhanced value of the property, produced by the prosperity of the city, occasioned by these establishments. It is suicidal to oppose them. There is too much that is fanciful and conjectural in the evils and dangers which are menaced. Be this as it may, you may as well attempt to stop up the mouth of Vesuvius as to arrest the application of steam to machinery at this day." *Mygatt v. Goetchins*, 20 Ga. 358. Other cases might be cited to the same effect, but none put the argument stronger than the trial judge in *Bell v. Railroad Co.*, 25 Pa. St. 175. The affirmance was by a divided court, and it may not, therefore, be an authoritative decision, but the opinion can stand on the force and clearness of its reasoning. The application was to enjoin an unlawful invasion of plaintiff's right of commons, and to abate a public and private nuisance, caused by the maintenance of freight yards and the storage and moving of cars therein. "It does not appear that defendants create any more noise or confusion than is usual or custom-

*Austin v. Augusta T. Ry. Co*

ary, or than is necessary and unavoidable, in carrying on the business of their road. To deny them the use of their road would be, in effect, to exclude all railroads from our cities; \* \* \* to stop all machinery, of every description, driven by steam; to stop all public markets which produce noise, and disturb the citizens residing adjacent thereto; and restrain the use of coal because of the intolerable annoyance occasioned by its smoke. We live in an age and country of progress. New branches of business are constantly springing up on every hand. The unparalleled increase in agriculture, commerce, and manufactures demands increased facilities in travel and transportation. These and many other considerations require the modification of former rules, and judicious application of the expansive principles of the common law to the altered conditions of the country and the necessities of the public. The common law is said—and with great truth—to be the perfection of human reason. It is the embodied justice and wisdom of each successive age, molded and formed into a system adapted to the habits and wants of the current times. These remarks are made for the purpose of showing that what would at one time have been held to be a nuisance might not, and probably would not, be so considered now. Private interests and comfort must often yield to public necessity or convenience. If the company had authority to make their road, \* \* \* they are entitled to the ordinary and necessary uses of their position, and would not be responsible for any unavoidable annoyances or disturbances such uses might cause." While holding that a lawfully constructed and lawfully operated railroad is not a nuisance, we are very far from holding that it may not be so operated in streets or on its private property as to become a nuisance. Railroad companies may use defective engines, which scatter unnecessary quantities of sparks, cinders, and smoke; at improper times, and in an unnecessary manner, they may sound their whistles, and blow off steam; they may maintain cattle yards in filthy conditions; they may maintain coal chutes and roundhouses at

*Austin v. Augusta T. Ry. Co*

improper places, and operate them so carelessly and noisily as to create a nuisance. But when they do so they will get no protection from their charter, for the legislature does not legalize nuisances, whether they are maintained by manufacturing companies, railroads, municipalities, or private individuals.

It has been suggested that under our ruling in this case a railroad might so conduct its business as to render near-by property uninhabitable, drive the owner from his dwelling, and absolutely destroy its value. When such a case arises, the owner would not be without redress; and that, too, whether the road had, in the first instance, condemned the land, and paid damages, or not. Payment of damages presupposes a subsequent lawful, usual, and ordinary operation, not the creation of a nuisance. But the courts can certainly take judicial cognizance that the lawful operation of a railroad does not render property uninhabitable, nor drive the owner from his premises. The unlawful use may do so, and for such unlawful use the law not only awards damages, but it adjudges that the nuisance shall be abated; but it has no remedy for the diminution in value occasioned by the lawful use of adjacent property, whether that use is by a railroad, or a factory, or the erection of some unsightly, but lawful, structures. *Railroad Co. v. English*, 73 Ga. 366; *Railroad Co. v. Cox*, 93 Ga. 561, 20 S. E. 68; *Butler v. Mayor*, etc., 74 Ga. 570; *Chemical Co. v. Colquitt*, 72 Ga. 172. The marked difference between the lawful and the unlawful use of railroad property, and the different consequences flowing therefrom, are discussed in *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739,—an instructive and weighty authority. There the company's roundhouse was located close to the church building. In this roundhouse many engines were housed, cleaned, fired up, steam blown off,—the act of blowing off steam frequently occupying from 5 to 15 minutes; hammering noises were made in the workshop; and other wrongs committed, including the building

## Austin v. Augusta T. Ry. Co

of 16 smokestacks, lower than the church windows, and so placed that the smoke therefrom poured directly into the audience room. "The engine house and repair shops as they were used by the railroad company were a nuisance in every sense of the term, and the liability of the company to respond for damages was not affected by its corporate character." The court thereupon laid down and applied the law of nuisance, wholly independent of the question of "taking or damaging property for public use"; but it distinctly recognized that, so far as the usual and necessary noises which were occasioned by the operation of the railroad, as such, and in the performance of its public duty, a property owner could not recover. JUSTICE FIELD says: "Undoubtedly a railroad over the public highways, including the streets, may be authorized by congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the street by its cars, with the noises and disturbances necessarily attending their use, no one can claim that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation." If the company would not be liable for operating its cars in the usual and ordinary manner in the street, it surely would not be liable for the same sort of operation when it moved the cars out of the street upon its private property. This case seems to be directly in point, and to sustain several of the propositions hereinbefore announced,—that the consequential damages are *damnum absque injuria*; that one cannot recover for noises necessarily attending the proper use of a railroad; that the private business of a railroad may be so conducted as to create a nuisance; and that, when the nuisance exists, the law of nuisance is to be applied, and not the law as to taking and damaging private property for public use. The company had no roundhouse, machine shop, or structure at this

## Austin v. Augusta T. Ry. Co

point. These were the freight yards immediately adjoining its depot, where the public was served by it as a carrier. The evidence does not show any unlawful, improper, or unusual noise, smoke, or movement of cars; therefore it could not have been a nuisance. In fact, the petition does not allege that it was a nuisance.

But it is said that these views can only be correct as applied to chartered companies; that an unincorporated railroad is a nuisance *per se*, and the owner thereof liable for all damages which such nuisance occasions; and therefore the same liability attaches to a chartered railroad, inasmuch as the constitution preserves the common-law right of action, and makes the company liable to the same extent and for the same acts as a private individual would be. And 1 Elliott, R. R. § 1, does, at first blush, seem to sustain the position, for it is there said: "Where a private person operates a railroad without legislative authority, it will be at the risk of being held liable for maintaining a nuisance, or for injuries caused by the operation of the road." 1 Wood, R. R. § 2; 19 Am. & Eng. Enc. Law. Except Reg. v. Train, 2 Best & S. 640,—a *nisi prius* case, to which we have had no access,—we have examined all the other authorities cited, and find that they do not sustain the text. All of them refer to instances where railroads, without warrant of law, were laid on highways or alleys. Certainly an unauthorized use of the highways is a nuisance, whether it be by a private person or an incorporated railroad. "When a railroad authorized to be made at one place is made at another, it is a mere nuisance on every highway it touches in its illegal course" (Com. v. Erie & N. E. R. Co., 27 Pa. St. 339); not on the private property between the highways. See, also, Kavanagh v. Railroad Co., 78 Ga. 271, 2 S. E. 636; *Id.*, 78 Ga. 804, 4 S. E. 113; Mayor, etc., v. Harris, 75 Ga. 771, 73 Ga. 428; Railroad Co. v. Woodruff, 86 Ga. 98, 13 S. E. 156 (Syl., point 2). The excavation of the roadway, laying of cross-ties and rails, movement of cars, frightening of animals, and obstruction of the streets, besides the physical



## Austin v. Augusta T. Ry. Co

invasion of the property holders' easements, and the interference with their means of ingress and egress, create a nuisance which is wholly independent of the amount of noise and smoke. If the cars be run ever so noiselessly by steam, horse power, cables, compressed air, or electricity, the result is the same. The gist of the nuisance is the obstruction of the highway. But the many cases which rule that an unauthorized, and therefore unlawful, use of the highway is a nuisance, fall far short of ruling that a railroad on private property, and operated in the usual method, constitutes a nuisance *per se*, so as to entitle near-by property owners to have the business abated, or recover damages from the usual and necessary noises and inconveniences resulting from its operation. There are countless switches and private tracks on private property running to and from factories, coal mines, stone quarries, mills, and warehouses in daily use all over the country, and, so far as we have found, they are not treated as nuisances. Many miles of lumber roads in this state on private property are operated by private owners, and they seem to be within the purview of the statute enacted for the protection of railroads. *Hodge v. State*, 82 Ga. 643, 9 S. E. 676. While this case does not call for a ruling as to the status of private roads, it is proper, in view of the argument, to consider whether they are nuisances *per se*. It certainly is not unlawful for a private citizen to own and operate a railway on his own land. *Pierce, R. R.* 2; 1 *Ror. R. R.* 8. And we have found no case holding that a railroad on private property is a nuisance *per se*. On the contrary, a number of cases expressly hold that they are not nuisances *per se*. "Railroads in cities and towns cannot, with propriety, be called nuisances. They are decided not to be such in numerous cases, both by English and American courts." *Geiger v. Filor*, 8 Fla. 332, cited in *Randall v. Railroad Co.*, 17 Am. & Eng. Ry. Cas. 186. To the same effect, *Bell v. Railroad Co.*, 25 Pa. St. 161; *Hentz v. Railroad Co.*, 13 Barb. 646; *Drake v. Railroad Co.*, 7 Barb. 508; and other cases cited in 6 *Rap. & M. Ry. Dig.* 886 (2). Several Geor-

## Austin v. Augusta T. Ry. Co

gia cases afford some intimations to the same effect, though the exact question was not involved. *Railroad Co. v. Kimberley*, 87 Ga. 169, 13 S. E. 277; *Hanbury v. Lumber Co.*, 98 Ga. 54, 26 S. E. 477; *Railway Co. v. Boardman*, 96 Ga. 359, 23 S. E. 403; *Railroad Co. v. Cohen*, 50 Ga. 451; to which may be added the *Marchant Case*, which, in effect, really decides the exact point, for the court there said: "This brings us to the question whether, in case a natural person were the owner of this road, operating it in the manner the defendant company is doing, he would be responsible to the plaintiff in damages. We answer this question in the negative. He would not be responsible, for the reason that he would have a right to the reasonable use and enjoyment of his property; and if, in such use, without negligence or malice, a loss unavoidably falls on his neighbor, he is not liable in damages therefor. \* \* \* If the construction contended for be correct, then we have a liability imposed upon corporations in the operation of their works which is not now, and never has been, imposed upon individuals. No principle of law is better settled than that a man has a right to the lawful use and enjoyment of his property, and that if, in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. The rightful use of one's own land may cause damage to another without any legal wrong. It is not contended that the injuries of which plaintiff complains are in any degree the result of the negligence or unskilled operation of defendant's road. On the contrary, the company has expended many dollars to enable it to convey its passengers and freight into the heart of the city. It might have hauled its enormous freights in carts or drays, and no one would have had a legal cause of complaint, although it is easy to see that the condition of the property owners would have been far more intolerable than it is at present. If a natural person were the owner of this road, and were operating

## Austin v. Augusta T. Ry. Co

it in the manner the company is now doing, he would not be responsible, since he would have the right to the reasonable use and enjoyment of his property. \* \* \* The necessities of a railroad, the character of its business, compel it to seek the heart of a great city. This is as much for the convenience of the public as for its own use, because it is in the direct line of its duty, whether that duty be performed by a corporation or an individual. It is a part of the lawful use and enjoyment of property, and, when it is done without negligence, entails no legal liability therefor." *Marchant Case*, 119 Pa. St. 541, 13 Atl. 690, affirmed in 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751. Railroads not only seek centers of large cities for convenience of the public and their own profit, but they are left without option in the matter. Their route and the width of the right of way are fixed by charter, and depots and depot yards must necessarily be contiguous to the main line. So that it is impossible for the company to act on the suggestion on the authority of *Baltimore & P. R. Co. v. Fifth Baptist Church*, *supra*, where the court, after deciding that a roundhouse was a nuisance, said, if the nuisance could not be abated, the plant must be located elsewhere. Changing the location of a roundhouse might be feasible, but changing the main line and adjuncts to the main line stands on a different footing. Location of the route by charter also makes it impossible to sustain the position that the wrongful act consists in the selection of the place where the plant is being operated. In itself it cannot be wrong for the road to do that which it is required by law to do. Nor can it be, as suggested, that, because the train movement is greater in a freight yard than along the main line, the company would be liable for decrease in value caused by constant movement of trains, and yet not liable for the diminution in value caused by the less frequent movement on the main line and in the country. The character and legal complexion of the company's act is not affected by the amount of business done by it. If the act complained of is unlawful, or a nuisance, it is liable. If the act is not a nuisance, and not

## Note

unlawful, it is not liable, unless there is some invasion of plaintiff's right.

We have thus, at considerable length, given the reasons for our decision, and, on account of the importance of the question, instead of giving mere citations, have departed from our usual rule, and made frequent and lengthy quotations from the authorities. We cannot do better than conclude with a final quotation from *Carroll v. Railroad Co.* (Minn.), 41 N. W. 661, where, in speaking of railroads being a public necessity, the court says: "Operating them in the most skillful and careful manner causes to the public incidental inconveniences, such as noise, smoke, cinders, vibrations of the ground, inconvenience by interference with travel at crossings, and the like. One person may suffer more from these than another. For instance, one whose premises lie within one hundred feet of the railroad will feel the inconvenience in a greater degree than one whose premises are at a distance of one thousand feet, and one who has to pass many times over it suffers more than one who seldom has occasion to pass it. But the difference is only in degree, not in kind. Such inconveniences are common to the public at large. If each person has a right of action for such inconveniences, it would go far towards rendering the operation of railroads practically impossible."

While there are several grounds in the motion for new trial, the foregoing principles cover the controlling one in the case, and we deem it, therefore, unnecessary to discuss them. If we are right in the opinion, it follows that the judgment refusing a new trial must be affirmed, although immaterial errors may have been committed during the trial. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., and LEWIS, J., dissenting.

## NOTE.

**Eminent Domain—Damages Not Allowed where No Part of Premises Are Taken.**—See *Sheldon v. Boston & A. R. Co.*, 13 Am. & Eng. R. Cas., N. S., 390, and *notes*, 393 *et seq.* See also *notes*, 1 Am. & Eng. R. Cas., N. S., 46 *et seq.*

Matheson *v.* Kansas City, etc., R. Co

MATHESON *et al.*

*v.*

KANSAS CITY, FT. S. & M. R. CO.

(*Supreme Court of Kansas, April 7, 1900.*)

**Death by Wrongful Act, whether Foreign Statute Enforceable.\*—**  
The Missouri statute giving a right of recovery for death caused by the neglect or wrong of another is so far penal in its nature, and so dissimilar in its provisions from the Kansas statute authorizing a recovery for death by wrongful act, that it is not enforceable in the courts of Kansas.

(Syllabus by the Court.)

**ERROR** by plaintiffs from Wyandotte county district court.  
*Affirmed.*

*T. P. Anderson* and *L. C. True*, for plaintiffs in error.

*Pratt, Dana & Black*, for defendant in error.

JOHNSTON, J. This was an action to recover for the death of James Matheson, an employee of the Kansas City, Ft. Scott & Memphis Railroad Company, who was killed in Missouri on September 14, 1891, and whose death is alleged to have been caused by the wrong and neglect of co-employees. The action is brought by and for the benefit of the widow and children of the deceased, who claimed to have a statutory right of recovery in Missouri, and one which is enforceable in Kansas. The Missouri statute pertaining to the subject was pleaded in the petition, but the trial court held the allegations of the petition to be insufficient, and that the rights of the plaintiffs under the Missouri statute could not be enforced in the courts of Kansas. The plaintiffs' cause of action arises under a statute of Missouri providing for recovery for death by wrongful act, which declares that the

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\*See *Chicago & E. I. R. Co. (Ill.)*, 12 Am. & Eng. R. Cas., N. S., 706, and extensive *note*, 711 *et seq.* See also *Perkins v. Boston & A. R. Co.*, 13 Am. & Eng. R. Cas., N. S., 601, and *note*, 603.

Matheson v. Kansas City, etc., R. Co

company "shall forfeit and pay for every person or passenger so dying the sum of \$5,000, which may be sued for and recovered: First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural born or adopted child or children of the deceased," etc. Rev. St. Mo. 1889, § 4425. The right to recover for death caused by wrongful act is purely statutory, and there is a division of judicial opinion as to how far such causes of action may be enforced in states other than where the injury and death occurred. It is a general rule that statutes have no extraterritorial force, and there can be no recovery under a statute penal in its nature, except in the state of its origin. Upon the grounds of comity, a cause of action arising in one state under a statute may be asserted in another, where the latter gives the same right of action, and there is a substantial similarity in the statutes of the two states. If the Missouri statute is penal in its nature, and the right of recovery given by it is inconsistent with the policy and laws of this state, the action is not maintainable; and the decision of that question is controlled by former adjudications of this court. In *McCarthy v. Railroad Co.*, 18 Kan. 46, it was expressly held that an administrator could not maintain an action in this state to recover for the injury and death of an employee of a railroad company in the state of Missouri, although the deceased was an inhabitant of Kansas. In *Hamilton v. Railroad Co.*, 39 Kan. 56, 18 Pac. 57, the points of dissimilarity between the Missouri and Kansas statutes were noted, and it was held that the plaintiff in that action could not recover in Kansas for an injury which resulted in death in Missouri. The question was again considered in *Dale v. Railroad Co.*, 57 Kan. 601, 47 Pac. 521. There a recovery was sought for a death that occurred in New Mexico under a statute of that territory which is substantially similar in its terms to the Missouri statute under which recovery is

*Matheson v. Kansas City, etc., R. Co*

sought in the present case. It was held that, while the act was compensatory in part, it was penal in its character, and that the principles of comity prevailing among the states do not go to the extent of enforcing in the courts of one state the penal statutes of another. Under the New Mexico statute it was provided that the railroad company should forfeit in every case the sum of \$5,000, without regard to the value of the life of the deceased, or the extent of the loss sustained by the plaintiff. These provisions are so nearly identical with those of the Missouri statute that the Dale Case must be regarded as decisive of this one. The dissimilarity between the statutes of the two states is pointed out by the supreme court of Missouri in *Vawter v. Railway Co.*, 84 Mo. 679; and the penal nature of the Missouri statute was declared in *Marshall v. Railroad Co. (C. C.)*, 46 Fed. 269. An arbitrary award of a fixed amount of damages, regardless of pecuniary loss sustained, is antagonistic to our policy, and is palpably inconsistent with our statute authorizing a recovery in such cases. Here the plaintiff must show a pecuniary loss, and the recovery is limited to the actual damages sustained. If the life of the deceased is of no pecuniary value to the next of kin, no more than nominal damages can be recovered. There have been a number of such cases, an illustration of which may be found in *Railroad Co. v. Weber*, 33 Kan. 543, 6 Pac. 877, where the jury specially found that the life of the deceased was of no pecuniary value to those for whose benefit the action was prosecuted. The arbitrary forfeiture of \$5,000 in such a case arising under the Missouri statute would be purely punitive, and the fact that the penalty was bestowed on relatives of the deceased would not take away the penal character of the award. It is contended that the statute is not penal, and cannot be so regarded, unless the forfeit or penalty is paid to the state as a punishment for the wrong committed. In a strict and limited sense, a penal statute is one imposing punishment for an offense committed against the state, but we think this altogether too narrow and restricted a view to take

## McAnally v. Pennsylvania R. Co

of statutes like the one under consideration. In terms, it provides for a forfeiture, and, like many other statutes of a penal nature, provides that the penalty or amount forfeited shall go to private persons. Such statutes are generally held to be penal in their character, although no part of the penalty is paid to the state. *Dale v. Railroad Co.*, *supra*; *Adams v. Railroad Co.*, 67 Vt. 76, 30 Atl. 687; *O'Reilly v. Railroad Co.*, 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244; *Marshall v. Railroad Co.*, *supra*; Story, Conf. Laws, § 621; 8 Am. & Eng. Enc. Law (2d Ed.) 880. Aside from the fact that the Missouri statute is not compensatory, it differs in other particulars from the Kansas statute. It is true that it is not necessary that the statutes of the two states should be exactly alike, but there must be a substantial similarity. As will be observed, there is an essential difference as to who may bring the action, and may constitute the beneficiaries of the penalty awarded. This difference was made clear in the Dale Case, where it was said "that the courts of this state will not undertake the enforcement of a statute penal in part, and so dissimilar in principle from the law of our own state." The judgment of the district court will be affirmed. All the justices concurring.

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MCANALLY

v.

## PENNSYLVANIA R. Co.

*(Supreme Court of Pennsylvania, Feb. 5, 1900.)*

**Crossings—Injury Resulting from Gateman's Attempt to Save Pedestrian from Apparent Danger.**—The plaintiff, intending to cross the railroad tracks, entered upon the space between the safety gates and the nearest rail before the gates were lowered, but, upon seeing a train approaching, stepped back from such rail, and stood between it and a high board fence, without attempting to pass under the then lowered gates. The distance from the rail to where he stood did not



## McAnally v. Pennsylvania R. Co

definitely appear, but the gateman, regarding plaintiff's position as perilous, and his calls to "get back" being disregarded, sought by force to compel him to get back; and plaintiff might have escaped injury from the train had he not resisted such force. There was also evidence tending to show negligence in the manner in which the train approached the crossing. *Held*, that a nonsuit was properly entered.

**Liability for Malicious or Wanton Acts of Employees.\***—Even if such conduct of the gateman towards plaintiff had been willful, wanton, or malicious, the railroad would not have been liable for its consequences, without proof that the railroad had instigated or authorized it.

**APPEAL** by plaintiff from Philadelphia county court of common pleas. *Affirmed*.

*A. S. Ashbridge, Jr.*, for appellant.

*Geo. Tucker Bispham*, for appellee.

**MCCOLLUM, J.** This is a case of which it may well be said that nothing exactly like it appears in the Reports. It must be conceded, however, that the principles applicable to the facts established by the testimony are well settled and plain. The plaintiff, intending to cross the railroad tracks, entered upon the space between the safety gates and the nearest rail before the gates were lowered. The distance from the gates to the rail was about 8 feet. When the plaintiff came within 6 inches of the rail, he saw a freight train approaching from the east. He testified that he thought the engine of the train was then from 15 to 20 feet from where he was when he first saw it, and that the train was then running, as he thought, at the rate of 20 or 25 miles an hour. Of course, his estimate of the distance of the locomotive from him, and of the speed of the train, was a mere guess. According to his testimony, he could not see a train coming from the east until he had passed the high board fence east of the sidewalk, and within 3 feet of the nearest rail. The safety gates were then closed. He made no effort to pass under them, as he might have done, or to go back from the rail to them; but he stepped back from

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\*See generally 14 Am. & Eng. R. Cas., N. S., 562 *et seq.*, notes.

## McAnally v. Pennsylvania R. Co

the rail, and towards the high board fence. His distance from the rail to the point where he stopped is not definitely defined by the testimony, but it is certain that the gateman regarded his position as perilous, and did all in his power to rescue him from it. As his calls to the plaintiff to "get back" were disregarded, he sought by force to compel him to get back; but he was met by a stubborn resistance, which resulted in the injury for which this suit was brought. It was barely possible that the plaintiff might have escaped injury from the train at the point where he stood when he was called to get back, but the appearances and probabilities were against this view, and the effort of the gateman to remove him to a place of safety was fully justified by them. There is nothing in the evidence to create a belief or authorize an inference that the gateman, in his efforts to remove the plaintiff from the danger to which he was exposed, was prompted by anything more than humane motives and a sense of duty. The plaintiffs, on the contrary, disregarded his plain duty under the circumstances, and stubbornly resisted the efforts made for his protection. Compliance with the call to "get back" was all that was required of him, and it was noncompliance with it which led to the injury of which he complains. Instead of yielding to the efforts of the gateman to rescue him, he resisted them, and thus precipitated the casualty which the unresisted efforts of the gateman would have prevented. The resistance he made to the gateman's efforts to save him from harm appears to have been the direct and proximate cause of the injury he received. The omission of the trainmen to ring the bell, blow the whistle, or check the speed of the train, was not the proximate cause of the casualty; nor was the failure of the gateman to lower the gates before the plaintiff passed them the cause of it. The plaintiff saw the train approaching in time to avoid dangerous proximity to it, and the avoidance would have been easy and certain if he had conformed to the instructions or acquiesced in the efforts of the gateman

Crossings—Injury  
Resulting from  
Gateman's At-  
tempt to Save  
Pedestrian from  
Apparent Dan-  
ger.

## McAnally v. Pennsylvania R. Co

in his behalf. But his disregard of the former and resistance of the latter were in defiance of both and inexplicable.

**Liability for  
Malicious or  
Wanton Acts of  
Employees.**

There is no evidence in the case showing that the conduct of the gateman towards the plaintiff was willful, wanton, or malicious; and, if there had been such evidence, the company would not be responsible for the consequences of such conduct, without proof that the company had instigated or authorized it. *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256, and *Scanlon v. Suter*, 158 Pa. St. 275, 27 Atl. 963. "An act done upon a sudden emergency, when life is apparently in peril, is not negligent, even though it be mistaken." *Floyd v. Railroad*, 162 Pa. St. 29 Atl. 396; *Donahue v. Kelly*, 181 Pa. St. 93, 37 Atl. 187; and *Oberdorfer v. Railroad Co.*, 149 Pa. St. 6, 27 Atl. 304. A careful consideration of the evidence in the case has convinced us that the learned court below did not err in entering a compulsory nonsuit, and refusing to take it off. Judgment affirmed.

MITCHELL, J. (dissenting). The plaintiff, discovering the approaching train, stepped back to a place he thought safe. It was a place with a narrow margin from danger, but, as the evidence indicates, it was in fact safe. The learned judge below so treats it, as he says it "probably, from subsequent events, was a place of safety, because the locomotive and some few cars passed him, and he was perfectly safe." While in that position, the gateman, having a different view, ran towards him, with a warning to "get back," and, finding his warning disregarded, seized hold of the plaintiff, who in the tussle was thrown, and had his leg cut off by the train. The act of the gateman was in clear excess of his authority. His right terminated with the warning, which he saw was intentionally disregarded. Plaintiff chose to stand on his own judgment. He had a right to do so. He was not a passenger who had committed himself to train or boat and was bound to obey the officers in charge, but was a citizen in the exercise of his right of travel on a public street. Whether his act was wise or foolish, it was his right, and he

Abstracts

would have taken upon himself the risk of the consequences. The act of the gateman was a trespass, and, as it was in the course of his employment, the defendant was liable for it. Even under the most favorable view, it was for the jury to say whether, under all the circumstances, his act was not negligence. I would reverse the judgment, and send the case to a jury.

STERRETT, C. J., joins in this dissent.

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VICKSBURG, S. & P. R. Co.

v.

SCOTT, SHERIFF *et al.* (HAMMETT *et al.*, INTERVENERS).

(*Supreme Court of Louisiana, Jan. 22, 1900.*)

**Legality of Railroad Aid Tax—Estoppel.**—Conceding that prior to the passage of Act No. 106 of 1892 a property taxpayer had the right to contest judicially the legality of a tax levied upon his property under a tax voted in aid of a railroad corporation at a special election ordered by a police jury under article 242 of the constitution and Act No. 35 of 1886, upon the ground that the police jury was without jurisdiction to order the election on the ground that the petition presented to it asking for such election had not been signed by the number of property taxpayers required by the act of 1886, that contest would be barred by estoppel and acquiescence if the right of exercise of the right were unreasonably delayed, and action taken only after the railroad had been constructed, and the corporation had expended large amounts of money upon the faith of the official promulgation of the result of the election. He would not be permitted individually to reap benefits and repudiate obligations.

**Special Elections—Contests—Statute.**—The provisions of Act No. 106 of 1892, authorizing judicial contests of special elections held under article 242 of the constitution of 1879, apply only to cases where the contest could be instituted within the limit of time prescribed by that act for the bringing of such a contest after the promulgation of the result of the election.

**Release of Railroad Aid Tax—Second Election.**—The fact that a special tax in aid of a railroad should have been voted by the property taxpayers of a parish furnishes no ground of complaint against another special tax being voted for, where the corporation in whose

## Abstracts

favor the first tax was voted has released and relinquished all claim to the same, and the tax has lapsed by failure of performance of the conditions upon which the tax was to be exigible.

**Railroad Aid Tax—Second Election—Double Taxation.**—Where a tax in favor of a railroad has been voted by the property tax owners of a parish at a special election, and, there being doubts as to the legality of the proceedings, the question of the imposition of the tax is submitted to the taxpayers at a second election under reservation to the railroad of any rights which it might have acquired under the the first election should the second be adverse to it, a taxpayer cannot complain, when the tax is again voted at the second election, that a double tax of five mills has been imposed upon his property. Though a tax of five mills was twice voted for, but one tax of five mills was to be enforced; one payment of satisfaction would exhaust the tax.

**Same—Effect of Consolidation of Railroads.\***—A special tax voted in favor of a railroad corporation in aid of the construction by it of a certain road inures to the benefit of a corporation resulting from the consolidation of that corporation with another.

**Same—Same.**—The object of the tax being the construction of the road, the consolidation of the two corporations carried with it no significance as to the legality and enforceability of that tax.

(Syllabus by the Court.)

**APPEAL** by plaintiff from parish of Richland judicial district court. *Affirmed.*

*Stubbs & Russell*, for appellant.

*Lazarus & Luce*, for appellees.

NICHOLLS, C. J., in delivering the opinion of the court said: "A statement of facts and note of evidence appears in the record, signed by the attorneys of the different parties, from which the following extract is made:

**'Statement of Facts and Note of Evidence.**

'(3) It is further agreed that the relinquishment signed by Hallow M. Hoyt, as president of the Louisiana & Arkansas Railroad Company, and on file in the record of the police jury, be filed, and introduced in evidence. (4) It is agreed and admitted that the Louisiana & Arkansas Railroad Company has not complied with the provisions of the ordinance submitted and voted on by the people for a special

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\*See note at end of case.

Abstracts

tax in its favor; that said road has not been built or completed, and that said tax has not been earned under the provisions of the ordinance, and that the right to said tax has lapsed, and the same has been forfeited by the said railroad company. (5) That the New Orleans, Natchez & Ft. Scott Railroad Company was created and organized in August, 1886; that the special tax, as declared in petition of plaintiff, was declared as voted in its favor by the authorities of Richland parish; that subsequently, to wit, on December 26 and 27, 1889, the New Orleans, Natchez & Ft. Scott Railroad Company, a railway organization, a corporation of Louisiana, and the New Orleans & Northwestern Railway Company, a corporation of Mississippi, were duly incorporated under and in pursuance of the laws of the state of Louisiana and Mississippi, as per act of constitution filed herewith, and made a part thereof. (6) It is further agreed and admitted that the New Orleans & Northwestern Railway Company, as thus consolidated, was placed in the hands of Charles H. Hammett and W. G. Jenkins, as receivers, on August 29, 1891, by the order of the United States circuit court for the Fifth circuit and Southern district of Mississippi and Western district of Louisiana, HON. DON A. PARDER, judge,—the said order placing the receivers in possession of all property, effects, or rights of said company, including any and all franchises, rights, immunities, donations, subsidies, etc.; that said receivers qualified, and took possession of all of said property, and that they and their successors have since proceeded with the collection of said subsidies and taxes now in contest, as well as all others; that on October 23, 1892, the said Charles H. Hammett and W. G. Jenkins resigned as receivers of the said railway company, and Louis K. Hyde was appointed sole receiver of said company, and all its rights, property, franchises, subsidies, etc., and has since been enforcing the collection of said tax or subsidy in contest, as well as all others, and has been in the possession and operation of said railway company, and all its property. (7) It is further agreed and admitted that at the election on January

## Abstracts

14, 1890, for a special tax of five mills for the period of ten years under the ordinance as introduced, the Vicksburg, Shreveport & Pacific Railroad Company voted against said tax. (8) It is further agreed and admitted that the line of the New Orleans & Northwestern Railway Company was projected and located through the parish of Richland down Rayville, and on the line indicated by said ordinance, by reason of the inducement held out by the voting and promulgation of said taxes having been carried by the property taxpayers of Richland parish, and that said railroad company, its projectors, stockholders, and incorporators expended, previously to the filing of the injunction herein, a sum exceeding one million of dollars, in the construction and equipment of said railroad on said line. (9) That the said railroad company was completed and in operation before January 1, 1891, and the conditions of said ordinance voted for at said election were complied with by said company.'''

## NOTE.

**Effect of Consolidation on Municipal Aid Subscriptions.**—Where, prior to consolidation, a township under statutory power voted to issue bonds for the stock of one of the companies, and after consolidation such bonds were issued to the consolidated company, reciting a due and legal consolidation, the defense that the consolidation was void is not open in an action on the bonds by a *bona fide* holder for value. *Washburn v. Cass County*, 3 Dill. (U. S.) 251.

Where a company accepts a subscription or donation from a county upon conditions imposed by vote, and by its contract with the county board, and afterwards consolidated with other companies under articles requiring the new company to perform such conditions, such original company, and each of the new companies which, by means of the consolidation, succeed to the ownership of the original road, will thereby become bound to perform all the conditions so imposed by the contract with the county and by the vote of the people. *People ex rel. v. Louisville & N. R. Co.*, 120 Ill. 48, 10 N. E. Rep. 657.

All the powers, rights, franchises, and immunities to which the several companies were entitled pass to the new or consolidated company, including a donation made by a town to one of the companies so consolidated. *Niantic Sav. Bank v. Douglas*, 5 Ill. App. 579.

Where an appropriation is lawfully granted a railroad company by a township it will, upon consolidation of the company with another,

Abstracts

pass to and vest in the consolidated company. *Scott v. Hansheer*, 94 Ind. 1; *Lewis v. Clarendon*, 5 Dill. (U. S.) 329; *Livingston County v. First Nat. Bank*, 128 U. S. 102, 9 Sup. Ct. Rep. 18.

The privilege to have subscriptions made to it by county courts without the sanction of a popular vote does not pass to the consolidated company, after the taking effect of the Missouri constitution of 1865. *Wagner v. Meety*, 69 Mo. 150; *State ex rel. v. Garroutte*, 67 Mo. 445; *Harshman v. Bates County*, 3 Dill. (U. S.) 150.

A consolidated railroad company assigned a donation note given to one of the corporations merged in the consolidation, on which the assignees brought suit. *Held* that, unless the consolidated company was shown to be legally created successor of the company to whom the note was given, it had no concern with its individual contracts with third persons; and if so identified, it can only have or give to its assignees a right to recover by proof that all conditions of recovery have been complied with. *Brown v. Dibble*, 30 Am. & Eng. R. Cas. 241, 65 Mich. 520, 32 N. W. Rep. 656.

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COLR

v.

DULUTH, S. S. & A. RY. CO.

(*Supreme Court of Wisconsin, Nov. 7, 1899.*)

**Injury to Stock on Track—Fences—Depot Grounds—Statute Creating Absolute Liability.**—Where the grounds left unfenced and treated by a railway company as depot grounds are unusually extensive, and the *locus in quo* is outside of and beyond the switches and side tracks, and is not used as a place of access by the public or patrons, either for freight or passengers, and only for the passing or standing of trains, the question whether it is necessary for and used as depot grounds, within the meaning of the statute of Wisconsin making a railroad absolutely liable for injuries to stock by its trains until it has fenced its road, except at depot grounds, is for the jury.

**Contributory Negligence.**\*—Under such statute, in an action for injuries to stock by a train, contributory negligence is no defense, unless the railroad had complied with the statute with respect to fencing its road.

**APPEAL** by defendant from Douglas county superior court.  
*Affirmed.*

*Callin, Butler & Lyons*, for appellant.

*H. V. Gard*, for respondent.

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\*See note at end of case.



## Abstracts

DODGE, J., delivering the opinion, said: "1. Where, as here, the grounds left unfenced and treated by a railway company as depot grounds are unusually extensive, and the *locus in quo* is outside of and beyond the switches and side tracks, and is not used as a place of access by the public or patrons, either for freight or passengers, and only for the passing or standing of trains, the question whether it is necessary for and used as depot grounds is properly for the jury. *Fowler v. Trust Co.*, 21 Wis. 78; *Plunkett v. Railroad Co.*, 79 Wis. 222, 48 N. W. 519; *Grosse v. Railroad Co.*, 91 Wis. 482, 65 N. W. 185; *Mills & Le Clair Lumber Co. v. Chicago, St. P., M. & O. Ry. Co.*, 94 Wis. 336, 68 N. W. 996.

2. It is contended by appellant that the situation presented does not fall within the statute making liability of a railway company absolute in case of its failure to fence its road, for the reason that, as appellant claims, it had in good faith done so, and omitted the place in question only because considered depot grounds. This contention does violence to the words of the statute (section 1810, Rev. St.). Until it shall build fences along both sides of its road (depot grounds excepted), and place cattle guards, the company is made absolutely liable. It is only after such fences and guards have been constructed that contributory negligence may be urged as a defense. *Id.* If the 500 feet south of the highway in question are not in fact depot grounds, the defendant has not yet complied with the statute, and is absolutely liable for injuries occasioned by the omission to fence. Judgment affirmed."

## NOTE.

**Injuries to Stock—Failure to Fence Track—Effect of Contributory Negligence.**—A railroad company which has failed to erect fences and cattle guards, as required by law, is liable, under § 1810, Rev. St. of Wisconsin, as amended by ch. 193, Laws of 1881, for the killing of horses when on its unfenced track, in the absence of evidence that the owner drove them upon the right of way, or abandoned them in a place where it was certain that they would go upon the track. *Heller v. Abbot*, 79 Wis. 409, 48 N. W. Rep. 598.

Abstracts

LAKE ERIE & W. R. CO.

v.

FALK *et al.*

(*Supreme Court of Ohio, March 20, 1900.*)

**Fires—Liability of Railroad—Evidence of Negligence Not Required—Statute.\***—In an action against a railroad company to recover the value of property destroyed by fire, the liability of the company is, under the provisions of the act of April 26, 1894, "making railroad companies liable for loss or damage by fire in certain cases, and prescribing rules of evidence" (91 Ohio Laws, p. 187), established when it is admitted or proved that the fire which caused the destruction originated on the land of the company and was caused by the operation of its road.

**Same—Same—Insurance—Damages.**—When the property so destroyed, under circumstances which make the company liable therefor, is insured, the right of the owner, as against the railroad company and the insurer, is limited to indemnity for his loss.

**Same—Same—Same—Same.**—The ultimate liability for such loss is upon the railroad company, and, in an action brought for its enforcement, the owner and the insurer being parties, there should be a recovery for the value of the property destroyed without deduction on account of payments made to the owner by the insurer in discharge of the obligation imposed by its policy.

**Same—Same—Same—Subrogation.†**—In an action brought by the owner against the railroad company to enforce such liability, an insurer, having before the termination of the action, made payment to the owner on account of such loss, should intervene for the purpose of being subrogated to the rights of the owner, to the extent of such payment, and the amount recovered from the railroad company should be adjudged to the owner and the insurer according to their respective interests.

(Syllabus by the Court.)

**ERROR** by plaintiff and a defendant to Hancock county circuit court. *Affirmed.*

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\*As to the constitutionality of statutes making a railroad an insurer against fires caused by the operation of its road, see *St. Louis & S. F. R. Co. v. Mathews* (U. S.), 6 Am. & Eng. R. Cas., N. S., 361, and *note*, 387 *et seq.*

†As to subrogation of insurer, see *Omaha & R. V. Ry. Co. v. Granite, etc., Ins. Co.* (Ill.), 12 Am. & Eng. R. Cas., N. S., 839.

## Abstracts

*Jason Blackford, John B. Cockrum, and A. Blackford, for plaintiff in error Railroad Co.*

*John Poe, for plaintiff in error Falk.*

*Burket & Burket, for defendant in error Insurance Co.*

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SOUTHERN RY. CO.

*v.*

## HOOPER.

(*Supreme Court of Georgia, May 12, 1900.*)

**Private Crossing—Implied Invitation to Public.\***—The building and keeping in repair by a railroad company of a bridge over or an approach to a private crossing is such an invitation to the public to use the same as renders the company liable for injuries resulting from defects negligently permitted to exist or remain in the structure.

**Instructions.**—The charges complained of were substantially in accord with the law above laid down. It was not erroneous to fail to charge on the subject of contributory negligence and apportionment of damages; there being no request to charge to this effect, and it affirmatively appearing that no such contention was made at the trial.

**Case at Bar.**—The law of the case having been settled by a previous decision of this court, and the evidence, though conflicting, warranting the verdict, the writ of error is so palpably without merit as to lead to the conclusion that it was sued out for delay only, and damages are accordingly awarded.

(Syllabus by the Court.)

**ERROR** by defendant from Floyd county city court.  
*Affirmed.*

*Shumate & Maddox, for plaintiff in error.*

*Fouche & Fouche and Robt. Chamblee, for defendant in error.*

## NOTE.

**Crossings—Implied Invitation.**—See *Dublin v. Taylor, B. & H. Ry. Co.* (Tex.), 13 Am. & Eng. R. Cas., N. S., 461, and *notes*, p. 469; *note*, 13 Am. & Eng. R. Cas., N. S., 767. In *Murphy v. Boston & A. R. Co.*, 133 Mass. 121, 14 Am. & Eng. R. Cas. 675, it was held that if a railroad corporation so constructs a private crossing over its track, at grade, in a city, as to hold it out as a suitable place for foot passengers to cross, it is bound to use reasonable precautions to protect them while so crossing.

Abstracts

MOOERS

*v.*

NORTHERN PAC. RY. CO.

(*Supreme Court of Minnesota, May, 28, 1900.*)

**Farm Crossings—Injury to Stock.**—Where a farm crossing over a railroad leads from a highway to private lands on the opposite side of the track, and the railroad company have closed and latched the gates from the highway a short time before injury to stock by one of its trains, as under the facts in this case, it cannot be held that it is liable for such injury.

**Same—Duty to Close Gates.\***—Where a railroad company has put in gates at a farm crossing in the country, as in this case, it is not required to station a guard at such crossing to keep the gates closed. Between the company and the other parties interested in maintaining the gate the obligation to keep the same properly closed is mutual, and demands the exercise of ordinary care from each.

(Syllabus by the Court.)

**APPEAL** by plaintiff from Crow Wing county district court. *Affirmed.*

*J. N. True*, for appellant.

*C. W. Bunn, J. H. Mitchell, Jr., and L. T. Chamberlain*, for respondent.

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\*See *Mobile & O. R. Co. v. Tiernan* (Tenn.), 15 Am. & Eng. R. Cas., N. S., 564, and *notes*, 567 *et seq.*

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SWANSON

*v.*

CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Minnesota, May 9, 1900.*)

**Farm Crossings—Duty to Close Gates.\***—It is the duty of the land-owner for whose benefit and convenience gates are constructed and placed in a railroad right of way fence at a private farm crossing upon the land of such owner to keep such gates closed.

**Same—Same.**—The railroad company owes no duty to the land-owner at whose instance and for whose convenience and upon whose

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\*See preceding case, and *foot-note*.

## Abstracts

land such gates are put into the railroad fence, or to those in privity with him, to keep such gates closed. Its full duty is performed if the gates are kept in reasonably good repair.

(Syllabus by the Court.)

**APPEAL** by plaintiff from Goodhue county district court.  
*Affirmed.*

*Albert Johnson*, for appellant.

*F. W. Root* and *F. M. Wilson*, for respondent.

BROWN, J., delivering the opinion, said: "It cannot be presumed that the defendant's employees left the gates open. Indeed, inasmuch as the gates were upon the premises of plaintiff, and under his control, the natural presumption would be that he, or those representing him, left them open. But this is not important. The plaintiff rests his case upon the square proposition that it was the duty of defendant to keep the gates closed as a part of its duty to "maintain" the fence. In this we cannot concur. No case involving the precise point has ever been before this court, and we are confronted with the question for the first time. It has been before the court of last resort in other states, and the trend of the later decisions relieves the company of the responsibility as to the landowner for whose benefit the gates are placed in the fence, and casts the duty of keeping the gates shut upon the latter. The company's duty is fully performed if it constructs a suitable gate, and keeps and maintains it in reasonably good repair. *Adams v. Railroad Co.* (Kan. Sup.), 26 Pac. 439, 49 Am. & Eng. R. Cas. 579; *Railroad Co. v. Glenn* (Tex. Civ. App.), 30 S. W. 845; *Bond v. Railroad Co.*, 100 Ind. 301, 23 Am. & Eng. R. Cas. 200; *Eames v. Railroad Co.*, 96 Mass. 151; *Diamond Brick Co. v. New York Cent. & H. R. R. Co.*, 58 Hun 396, 12 N. Y. Supp. 22; *Megruer v. Lennox* (Ohio Sup.), 52 N. E. 1022; *Railroad Co. v. Robinson* (Tex. Civ. App.), 43 S. W. 76; *Box v. Railroad Co.*, 58 Mo. App. 359. We believe this rule to be consistent, and in accord with the plainest principles of equity and justice, and we adopt it as the law of this state. It can work no hardship to the landowner.

Abstracts

He and his servants can, without the least inconvenience, keep the gates closed, and the railroad company should not be burdened with responsibility for their neglect to do so. To impose the duty upon the company, at least as respects the landowner, for whose benefit the gates are erected, and those in privity with him, would be, it seems to us, extremely unreasonable and unjust. It would be impracticable for the company to perform the duty, if imposed upon it, without keeping an employee constantly on the watch to guard and protect the landowner from his own neglect. And a construction of the law in harmony with appellant's contention would result in relieving the landowner of all responsibility with respect to keeping the gates closed, and cast the entire burden on the company. We cannot concur in this view of the law, or adopt the theory of appellant's counsel. Our statutes not only require the railroad company to construct a fence, but to maintain the same after it has been constructed; and counsel insists that a failure to keep such gates closed is a failure to maintain the fence. The contention is untenable. If the gates are kept in a reasonably good condition of repair, they are sufficiently 'maintained,' within the meaning of the statutes. We do not wish to be understood as holding that this rule is applicable to any person or persons other than the landowner for whose convenience and benefit the gates are placed in the fence, and those in privity with him. The question of liability of the company as to third persons who suffer damage by reason of such gates being left open is not decided. Perhaps, if the company furnished the landowner a lock and key for such gates, it would be relieved from liability even as to such third persons, within the meaning of section 6889, Gen. St. 1894. But this statute cannot be construed as casting the burden of keeping the gates closed upon the company, at least not as to the landowner. Our conclusion is that the learned trial judge properly dismissed the action, and the order appealed from is affirmed."

## Abstracts

SIMS

v.

WESTERN &amp; A. R. Co.

WESTERN &amp; A. R. Co.

v.

SIMS.

*(Supreme Court of Georgia, April 9, 1900.)*

**Wrongful Death by Operation of Railroad Train—Presumption of Negligence—Statute.**—As the evidence would have authorized the jury to have found that plaintiff's husband was killed by the running and operation of defendant's train of cars,—thereby, under the statute, raising a presumption of negligence on the part of the railroad company,—and as there was no evidence to rebut such a presumption, or to show that plaintiff's husband, by the use of ordinary care, could have avoided the casualty, a nonsuit should not have been granted. Civ. Code, § 2321. See *Railroad Co. v. Steadly*, 65 Ga. 263; *Railroad Co. v. Bird*, 76 Ga. 13; *Railroad Co. v. Phillips*, 3 S. E. 449, 78 Ga. 619; *Railroad Co. v. Bryant*, 15 S. E. 537, 89 Ga. 457 (Syl., point 2); *Strom v. Railroad Co. (Ga.)*, 33 S. E. 30.

**Same—Pleading Negligence.\***—In an action against a railroad company for a homicide alleged to have been caused by the negligent running of its locomotive and cars, there was no error in overruling a demurrer to the petition on the ground that it did not allege what particular train, car, engine, or machinery of the defendant company struck and knocked the decedent from its track, or in what direction, north or south, the train was running, or at what hour the casualty occurred, or "specify the particular acts of carelessness and negligence of defendant, and how and in what manner its locomotive, cars, and machinery was negligent and careless."

SIMMONS, C. J., dissenting.

(Syllabus by the Court.)

ERROR by plaintiff and cross error by defendant from Whitfield county superior court. *Reversed on main bill of exceptions, and on cross bill affirmed.*

*Shumate & Maddox*, for plaintiff in error.*R. J. & J. McCamy and Payne & Tye*, for defendant in error.

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\*See generally 11 Am. & Eng. R. Cas., N. S., *note*, 413 *et seq.*

Abstracts

CENTRAL OF GEORGIA RY. CO.

v.

BOND.

(*Supreme Court of Georgia, June 5, 1900.*)

**Accident on Track—Opinion Evidence.\***—The rule that, where the question under examination is one of opinion, a witness not an expert is incompetent to testify to his opinion without stating the facts on which it is based, applies when an attempt is made to prove what distance a train running at a given rate of speed would “knock” a man struck by it on the track.

**Appeal—Review.**—The supreme court cannot undertake to determine whether or not permitting a witness to answer a particular question propounded to him was prejudicial to the party complaining thereof, when it is not informed what such answer was.

**Evidence—Ordinances.**—An exemplification of a municipal ordinance is not admissible in evidence unless duly certified under the corporate seal.

**Same—Same—Knowledge of Trainman.**—It is not competent for any purpose to show that a railroad employee who has violated a municipal ordinance was ignorant of its existence.

**Death of Husband—Measure of Damages.**—When a widow is entitled to recover for the homicide of her husband, the measure of her damages is the full value of his life, although she and he were living in a state of separation at the time of his death.

**Motion for New Trial.**—A ground of a motion for a new trial alleging error in an instruction to the jury must set forth, either literally or in substance, the language complained of, or such ground cannot be considered.

**Negligence—Violation of Ordinance.†**—The violation by a railroad company of a valid municipal ordinance is negligence *per se*, and the court may so inform the jury.

**Instructions—Appeal—Review.**—A bare complaint that “the court erred” in giving a particular instruction brings nothing into question except the soundness, in the abstract, of the proposition or propositions therein announced. If the instruction is abstractly correct, the question of its inapplicability to the case in hand must be dis-

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\*See generally *McVey v. Chesapeake & O. Ry. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 788, and *note*, 799.

†See *Sutherland v. Cleveland, etc., Ry. Co.* (Ind.), 8 Am. & Eng. R. Cas., N. S., 424, and *notes*, 428 *et seq.* See also *Walters v. Chicago, etc., Ry. Co.* (Wis.), 15 Am. & Eng. R. Cas., N. S., 606, and *note*, 613.



## Abstracts

tinctly made, by clearly pointing out how or why it was inappropriate.

Same.—Where, in its charge to the jury, the court omits to announce to them a rule of law having a direct bearing upon a contested issue in the case, the refusal of a proper request so to do is manifestly erroneous.

(Syllabus by the Court.)

**ERROR** by defendant from Macon county superior court.  
*Reversed.*

*Wm. D. Kiddoo*, for plaintiff in error.

*Hardeman, Davis & Turner, T. C. Taylor, and Greer & Felton*, for defendant in error.

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CENTRAL OF GEORGIA RY. CO.

*v.*

NEIDLINGER.

(*Supreme Court of Georgia, March 3, 1900.*)

**Injury to Stock—Unlawful Speed—Proximate Cause.\***—A railroad company is not liable for an injury simply because, at the time it was occasioned, the train causing the same was being operated in a manner forbidden by law. To make the company liable, the failure to properly conduct the train must have operated as a cause of the injury. *Railroad Co. v. Main*, 64 Ga. 649. Accordingly, when, in the trial of an action to recover damages for killing a cow, proof is made that the train was passing through a town at a speed of 20 miles an hour or more, and that such speed was not checked in approaching a crossing, and it did not appear that there was any ordinance or by-law of the town regulating the speed of passing railroad trains, the presumption of negligence which arose by showing that a cow was struck and killed by the locomotive was rebutted when it was conclusively shown that the injury did not occur on a crossing or public road, but at a point some 40 or 50 yards beyond the same, and that the animal suddenly came on the track at a point so nearly in front of the locomotive that, notwithstanding all possible efforts, the progress of the train could not be arrested before the animal was struck. The failure to check the speed, not being the cause of the injury, did not render the company liable. *Prather v. Railroad Co.*, 9 S. E. 530, 80 Ga. 437; *Ivy v. Railway Co.*, 13 S. E.

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\*See Georgia, etc., *Co. v. Clary* (Ga.), 11 Am. & Eng. R. Cas., N. S., 856, and extensive note, 857 *et seq.*

Abstracts

947, 88 Ga. 71; Railroad Co. v. Williams, 18 S. E. 825, 93 Ga. 253; Railroad Co. v. Burke, 20 S. E. 318, 93 Ga. 319; Railway Co. v. Gravitt, 20 S. E. 550, 93 Ga. 369, 26 L. R. A. 553; Martin v. Railroad Co., 22 S. E. 626, 95 Ga. 361.

(Syllabus by the Court.)

**ERROR** by defendant from Effingham county superior court. *Reversed.*

*A. C. & A. R. Wright and Lawton & Cunningham*, for plaintiff in error.

*R. W. Sheppard*, for defendant in error.

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LOUISVILLE & N. R. Co.

*v.*

PENROD'S ADM'R.

(Court of Appeals of Kentucky, March 31, 1900.)

**Negligence—Pleading.**—In an action for wrongful death alleged to have resulted from the frightening of a team of horses by defendant's train, where there is no allegation of negligence in failing to give proper signals, and the petition sets out distinctly in what the negligence sued for consisted, it is error to submit to the jury the question of negligence in failing to give signals.

**Railroads in Streets—Frightening Horses—Care Required of Railroad.\***—In running a train through a city, a railroad is not required to maintain a lookout on the adjacent premises, in order to avoid frightening teams thereon; nor to avoid noises for such purpose, until the trainmen perceive that a person is in danger of being injured through the frightening of his team by the train.

**Same—Same—Same—Signals.**—In running a train through a city, crossing signals required by law must be given, and a person with a team on adjacent premises has a right to rely on the performance of this duty.

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\*As to frightening horses, see generally *Atlanta, etc., Ry. Co. v. Durham* (Ga.), 16 Am. & Eng. R. Cas., N. S., 606; *Brendle v. Spencer* (N. Car.), 16 *Id.* 722; *Southern Ry. Co. v. Pool* (Ga.), 15 *Id.* 617; *Chicago, etc., Ry. Co. v. Parks* (Kan.), 14 *Id.* 808; *Dewey v. Chicago, etc., Ry. Co.* (Wis.), 11 *Id.* 275; *Flaherty v. Harrison* (Wis.), 10 *Id.* 176; *Weil v. St. Louis S. W. Ry. Co.* (Ark.), 9 *Id.* 721, and *notes*, p. 724 *et seq.*; *Louisville, etc., R. Co. v. Smith* (Ky.), 15 *Id.* 613; *Missouri, etc., Ry. Co. v. Magee* (Tex.), 15 *Id.* 186.

## Abstracts

**Failure to Give Signals where Person Injured Knew Train Was Approaching.\***—The failure of a railroad to give the crossing signals required by law is not actionable negligence, if the person claimed to have been injured thereby knew of the approach of the train in time to avoid the injury.

**APPEAL** by defendant from Hopkins county circuit court.  
*Reversed.*

*B. D. Warfield, M. K. Gordon, H. W. Bruce, and Edward W. Hines, for appellant.*

*A. J. Waddill, Joseph H. Lewis, and W. H. Holt, for appellee.*

HOBSON, J., delivering the opinion, said: "The proof does not show that appellant's servants saw or knew of the intestate's peril, nor does it show that they made any unnecessary or improper noises. It appears that the usual backing signals were given, as it was clearly proper should have been done in moving the train in a city. The only other noise shown was from the escape of steam when the engine was reversed, which, under the uncontradicted testimony, was both usual and necessary. Appellant's servants in charge of its train were not required to keep a lookout on the adjacent premises, and they owed the intestate no duty to avoid noises until they perceived his danger. We do not think the evidence, as a whole, warranted a recovery on either of these grounds. It was usual for the trains to make a good deal of noise at this point, and there is nothing in the evidence to show this improper. Persons, therefore, in the neighborhood should have governed their business accordingly. It is indispensable to the operation of railroads to have switches and additional tracks about their stations. Engines cannot be safely reversed without letting off steam, and it is peculiarly necessary to give ample notice when a train is to be backed in a city. If the rule were otherwise, we do not see how train yards can be maintained in a city at all. To hold appellant

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\*See *note*, 16 Am. & Eng. R. Cas., N. S., 631; 12 Am. & Eng. R. Cas., N. S., 406; *note*, 11 Am. & Eng. R. Cas., N. S., 99.

Abstracts

liable here on this ground would be, in effect, to declare it negligence to blow a whistle under such circumstances. The proof is clear that the horses began prancing and backing when the train was at the crossing, and then when it whistled and let off steam, and came back towards them, they ran off. There was nothing to apprise the trainmen of the intestate's danger, and no evidence of any negligence on their part in proceeding with the operation of their train.

"It was the duty of the appellant, however, in running its trains through this city, to give the signals of its approach to the street crossings required by law, and although the intestate was not using the street crossing, he had a right to rely on these signals being given. While this is not the rule in the country, in cities, where the population is crowded, and persons must necessarily be about the railroad tracks with teams, a just regard for human life cannot permit trains to be operated without reasonable notice of their approach. On the return of the case, appellee may amend his pleading, if he desires to do so, so as to present this ground of recovery.

"The proof shows that the team that the intestate was driving was afraid of the train, and that he had been cautioned to be particular with them in the lane, and told that they would not stand in that lane unless they were held. It also shows that it was about train time when the accident occurred; that the intestate wrapped the lines around the front of the wagon, and then got in the back part of it, and was shoveling the coal rapidly into the coal house, when the train came up; that when the horses started he grabbed for the lines, but whether he reached them or not the witnesses could not tell. On this proof, the court should have instructed the jury that, if the team was likely to be frightened by the trains, and the intestate knew it, and also knew of the approach of the train, or had reason to know it, he has guilty of contributory negligence, and could not recover. The object of giving signals of the approach of a train is to apprise people of its coming. There is some evidence in the record that the deceased was facing the train as it approached him, and, if he knew of the

## Abstracts

approach of the train, there can be no recovery on the ground that the signals were not given. Judgment reversed, and cause remaded for further proceedings not inconsistent with this opinion."

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HUFF

v.

CHESAPEAKE &amp; O. RY. CO.

*(Supreme Court of Appeals of West Virginia, April 14, 1900.)*

**Using Tracks as Footpath—Personal Injuries—Liability of Railroad.\***—A person using a railroad track as a footpath for his own convenience, elsewhere than at a lawful crossing, and injured by a train while so doing, cannot recover damages of the railroad company, unless it be guilty of wanton or gross negligence. *Spicer v. Railway Co.*, 12 S. E. 553, 34 W. Va. 514, 45 Am. & Eng. R. Cas. 28, 11 L. R. A. 385.

**Same—Same—Crossing Signals.†**—The statute (Code, c. 54, § 61), requiring the bell to be rung or a whistle to be blown at crossings, is designed for those passing over the tracks at such crossings, not for those using the track elsewhere for their convenience as a footpath. *Spicer v. Railway Co.*, 12 S. E. 553, 34 W. Va. 514, 45 Am. & Eng. R. Cas. 28, 11 L. R. A. 385.

(Syllabus by the Court.)

**ERROR** by plaintiff to Kanawha county circuit court.  
*Affirmed.*

*E. W. Wilson* and *A. B. Littlepage*, for plaintiff in error.  
*Simms & Enslow*, for defendant in error.

BRANNON, J., delivering the opinion, said: "Our cases decide this case for the defendant. In *Spicer v. Railway Co.*, 34 W. Va. 514, 45 Am. & Eng. R. Cas. 28, 12 S. E. 553, 11 L. R. A. 385, we held that 'a person using a railroad track as a footpath for his own convenience, elsewhere than at a lawful crossing, and injured by a train, cannot recover damages of the railroad company, unless it be guilty of wanton or gross negligence.' The many

\*See note, 13 Am. & Eng. R. Cas., N. S., 824; 11 Am. & Eng. R. Cas. N. S., 830 *et seq.*

†See *Louisville & N. R. Co. v. Vittitoe's Adm'r* (Ky.), 8 Am. & Eng. R. Cas., N. S., 666, and note, p. 671.

Abstracts

authorities referred to in that case will support this position. Shear. & R. Neg. § 480, says: 'The use of a railroad track, cutting, or embankment, not occupying a highway, or being at a lawful crossing of public roads or highways, is exclusively for the company and its employees; and it is therefore an act of negligence to travel laterally upon it, even though it is entirely uninclosed and opens on a highway.' There was the public turnpike road a few yards distant from the track, leading to the point to which Huff was going. Why did he not use it? Situated as Huff was, having entered upon the company's property voluntarily and against its will, he was bound, from motives of self-preservation, to keep the most astute lookout. That late and great work, Elliott on Railroads (section 1258), says: 'If one who is not an employee, without the knowledge or consent of the company, goes into its yard, which is interlaced with tracks, upon which engines and cars are being switched and changed, he must use care commensurate with the peril in which he has placed himself, and the company owes him no duty except not to injure him willfully, or by negligence, after its employees see his danger and inability to escape in time to prevent such injury by the exercise of due care. The switch yard of a railroad company is usually even a more dangerous place than the right of way, where there is but a single track, and, as it is likely to be in continuous use by the company in switching, storing, and repairing cars, making up trains, or the like, there is perhaps still less reason for implying a license or invitation to strangers to use such premises than in the case where there is but a single track.' Huff says he looked back to see if any train was coming. Where is the plausibility in that statement, when we know from his own evidence that the freight train had a brilliant headlight flooding with light the track on which that yard engine was slowly backing into the roundhouse, tender in advance of it, the roundhouse being only a few yards away. The freight train had not yet passed him its full length when he was struck, and it is a strong prob-

## Abstracts

ability, arising, not from any oral testimony of the company, but from the nature of the case as stated by Huff himself,—a physical or natural probability,—that, if he had shown the slightest care, he would have seen that engine, because he could have seen it. At any rate, suppose he looked, and did not see it; is the company to blame for that? It was his misfortune, not the company's fault. The plain truth is he could and should have seen that engine. He was simply carelessly walking forward on that track. He and his companions had been drinking. He did not even walk on the smooth ground between the tracks. He took the dangerous railroad track for his path.

"What duty did the company owe Huff? If it broke no duty, how can we mulct it in damages, even to repair this unfortunate man's calamity? The only duty the company owed him was not to wantonly or willfully injure him. Had its employees seen him in time to save him, it would have been their duty to use ordinary care to do so. But how could they see him that dark night, when the engine was backing? And, even if they had seen him, they might presume that he would get off the track. Beach, Contrib. Neg. § 202, says: 'As a general rule, a trespasser on the track is held to be there at his own peril. He must keep himself informed of the approach of trains from any direction, and, in case of injury, will be held guilty of such contributory negligence that he cannot recover from the railway, notwithstanding concurrent negligence on their part.' Section 203 says: 'The liability of a railroad company to a trespasser on its tracks must be measured by the conduct of its employees, after they became aware of his presence there, and not by their negligence in failing to discover him; for, as to such negligence, the contributory negligence of the trespasser will defeat a recovery.' In *Bias v. Railway Co.*, 46 W. Va. —, 33 S. E. 240, JUDGE DENT said that, though the company should keep a proper lookout 'for helpless trespassers' on the track, yet, 'if such trespasser is not helpless, the duty of keeping a lookout devolves upon him as well as

## Abstracts

the trainmen, and, if an accident happens by reason of their mutual negligence, no recovery can be had.' But, I ask again, where is the negligence of the company? Could the hands see in front of the tender that dark night? Was the company to keep a watchman on that tender? But it is said they should have rung the bell. Though this yard was in a town of 500 people, yet there was no highway there, and the engine was slowly backing into the roundhouse, a few yards off. Where is the law that required a bell to be rung at that place? *Spicer v. Railway Co.*, *supra*, and Code, c. 54, § 61, tell us that a bell is to be rung only at crossings, for those passing over the track at such crossing, 'not for those using the track elsewhere, for their convenience as a footpath.' It is said there should have been a lamp on the tender. Where is the law that required it in that yard?

"It is said that Huff was going to the ticket office to buy a ticket. That makes no difference. That did not authorize him to use the track as a footpath. He was none the less a trespasser for that reason.

"It is urged upon us that people were accustomed to walk on the track in that yard. If so, it was against the will of the company. It had taken the precaution to post warnings and protests against the use of its yard by pedestrians, and with no plausibility can it be said that the use of it by them was permissive on its part. Could it be required to keep a company of guardsmen there to expel trespassers from the track? We know from general observation that in no other way can a railroad company avoid such trespassing. But even say that such use was permissive; what, then, is the law? Elliott, R. R. § 1250, speaking of those who are real licensees to use a railroad track as a footpath, says: "The better rule is that the licensee takes his license subject to its concomitant perils, and the licensor owes him no duty, except to refrain from willfully or wantonly injuring him. \* \* \* It seems to us that the only duty which it owes to such person, whether trespassers or bare licensees, is not to willfully or wantonly injure them, but to use reasonable care to avoid



## Abstracts

injury to them after their danger is discovered. It seems to us that some of the courts beg the question when they say that the company must keep a lookout, and use care to discover persons on the track where they may be expected, although not at a crossing or the like. Is the company bound to expect them at any such place, and to run its trains with reference to them? Is not the assumption that such a duty rests upon the company an undue assumption? The just and reasonable assumption would seem to be that they will not be on the track when trains are passing, or, if they are, that, as they take their license subject to concomitant perils, they will look out for their own safety, without special warning or change by the company in the manner of using its road, and that it may act on this assumption until it discovers their danger.'

"But why talk about the law, where there is a license by the company, when in this case there was not only no license, but protest against it publicly made? The mere fact that people often trespassed on the track, and the company did not stop them, does not imply consent on the part of the company to its use as a footpath, and will not create any right in the public to use it, as shown in *Spicer v. Railway Co.*, *supra*. 'Mere passive acquiescence does not amount to license.' *Bancroft v. Railroad Corp.*, 97 Mass. 275; *Railroad Co. v. Sherman's Adm'r*, 30 Grat. 602; *Railroad Co. v. Harman's Adm'r*, 83 Va. 577, 8 S. E. 251. 'The acquiescence of a railroad company in the use of its track by the public as a highway does not confer a right or license to use it.' *Brown's Adm'r v. Railroad Co.*, 97 Ky. 228, 30 S. W. 639. But *Nuzum v. Railway Co.*, 30 W. Va. 228, 4 S. E. 242, is principally relied on to support this action. In no view does it do so. In that case the track ran over ground constituting the public wharf on the Ohio river, in the populous city of Wheeling. It was a public highway, where Nuzum and everybody else had a right to be, whereas in this case Huff had no right at all to be where he was. In that case the company ran, at the rate of 8 or 10 miles an hour,

## Abstracts

over that public wharf ground, a number of cars detached from the engine, without bell or whistle of warning, and without anybody on the cars to warn people. Furthermore, that is an exceptional case. The court did not decide absolutely that the company was liable, though I think it clearly was, under the circumstances. The court below excluded the plaintiff's evidence, and this court said that it was not necessary to decide that the facts were sufficient to prove negligence in the company to justify a recovery, nor to determine whether the plaintiff was barred from recovery by his contributory negligence in walking on the track, and said that the real question before the court was whether the lower court was authorized to withdraw the evidence from the jury, and held only that it erred in so doing. Seeing no error in the judgment of the circuit court, it is affirmed."

## ILLINOIS CENT. R. CO.

v.

## GRIFFIN.

*(Supreme Court of Illinois, Feb. 19, 1900.)*

**Appeal—Review.**—On appeal from a judgment of the appellate court, the supreme court will review the evidence only to determine whether it tends to support the judgment.

**Frightening Horses—Cinder Pile near Crossing—Traveller's Care—Question for Jury.\***—Where a railroad company is required by a statute to maintain its highway crossings and their approaches in such condition as to be safe to persons and property, a traveller in approaching such a crossing is not bound to anticipate or look out for any thing attributable to the railroad calculated to frighten his horse, except passing trains; and plaintiff's care in driving to the crossing, where her horse was frightened by cinders piled in the highway by the railroad, was a question for the jury, as there was evidence tending to show due care on her part.

**Same—Same—Negligence.**—It is negligence on the part of a railroad to pile cinders to be used for ballasting its track upon the public

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\*See *Valley v. Concord & M. R. R.* (N. H.), 9 Am. & Eng. R. Cas., N. S., 128, and *foot-note*.

## Abstracts

highway near its crossing, so as to create objects calculated to endanger the travelling public by frightening horses.

**Contributory Negligence—Instructions.**—It is for the jury to determine from the evidence whether there was contributory negligence, and it is not the province of the court to tell the jury that a certain act was imprudent or negligent.

**Disposition of Horse—Evidence.**—The fact that a horse runs away some time after an accident does not show that it was unsafe when the accident occurred.

**Hearsay Evidence.**—Hearsay evidence is not admissible.

**APPEAL** by defendant from Fourth district appellate court.  
*Affirmed.*

*William H. Green* (*J. M. Dickinson, Gen. Sol.*), for appellant.

*W. F. Bundy* and *Frank F. Noleman*, for appellee.

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DALTON'S ADM'R

*v.*

## LOUISVILLE &amp; N. R. CO.

(*Court of Appeals of Kentucky, May 2, 1900.*)

**Riding on Freight Trains by Sufferance of Trainmen—Duty of Railroad.\***—A railroad company owed no duty to a person riding on its freight train upon which passengers were not carried, merely by the sufferance of the trainmen, except that of avoiding to injure him after knowledge that he was in danger.

**APPEAL** by plaintiff from Hardin county circuit court.  
*Affirmed.*

*Gardner & Moxley*, for appellant.

*W. H. Marriott* and *H. W. Bruce*, for appellee.

HOBSON, J., delivering the opinion, said: "It is earnestly insisted for appellant that, notwithstanding this, he may recover, because of the gross negligence of appellee in allowing the two trains to collide. But the trouble with this is

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\*See *Leonard v. Boston & A. R. R.* (Mass.), 13 Am. & Eng. R. Cas., N. S., 825, and *note*, 828 *et seq.*

Abstracts

that appellee owed appellant no duty to carry him safely ; that he took the risks of the journey when he rode upon its freight train in this way. The only obligation appellant owed to him was not to injure him after knowledge of his danger.

"There is no allegation that anything was omitted which might have been done for the intestate's safety after the danger was discovered, and the court properly sustained a demurrer to the petition. *Duff v. Railroad Co.*, 2 Am. & Eng. R. Cas. 1; *Railroad Co. v. Burnsed* (Miss.), 12 South. 958, 35 Am. St. Rep. 656; *Everhart v. Railroad Co.*, 41 Am. Rep. 567 ; *Eaton v. Railroad Co.*, 15 Am. Rep. 513; *Condran v. Railway Co.*, 14 C. C. A. 506, 67 Fed. 522, 28 L. R. A. 749, and note; *Railroad Co. v. Hailey* (Tenn. Sup.), 29 S. W. 367, 27 L. R. A. 549."



## INDEX TO NOTES.

### ACTIONS.

- Action in Federal court not ground for forfeiture of railroad franchise, 625.
- Forfeiture of franchises, 625.
- Parties to action to forfeit charter for ultra vires acts of foreign railroad company controlling stock, 627.

### BRANCH ROADS.

*See Railroads.*

### BRIDGES.

- Acquisition of lands by railroad for, 261.

### CARRIERS OF FREIGHT.

#### Connecting Carriers.

- Liability of initial carrier on contract for through shipment, 284.

Delay in shipment of freight as proximate cause of loss, 272.

Duty to furnish suitable cars, 333.

Effect of delivery to true owner, 341.

#### Misdelivery.

Failure to require identification of consignee, 339.

Liability for, 338.

Liability for delivery to fraudulent purchaser, 340.

Liability of carrier for delivery of goods refused by one person to another person of same name, 340.

Presumption of proper delivery, where consignee has not been identified, 340.

Whether wilful misconduct, 341.

#### Rates.

Discrimination by companies forming new line, 379.

#### Warehouseman.

Liability as warehouseman, 397.

When liability begins, 398.

### CARRIERS OF PASSENGERS.

*See Tickets and Fares.*

Ejection of passenger for failing to pay child's fare, 139.

Presumption of negligence from injury to passenger in collision between trains, 240.

Running train between car and station, 58.

Whether contributory negligence for passenger to allow ladies to occupy safest position in car, 101.

#### Who Are Passengers.

Persons on train by permission of employee, 267.

### CONNECTING CARRIERS.

*See Carriers of Freight.*

### CONSOLIDATION.

*See Municipal Aid.*

### CONTRACTS.

Ultra vires as defence to executed contract, 348.

### CONTRIBUTORY NEGLIGENCE.

*See Fences.*

Passenger allowing ladies to occupy safest position in car not guilty of, 101.

### CROSSINGS.

Implied invitation, 752.

### DAMAGES.

*See Eminent Domain.*

### DISCRIMINATION.

*See Carriers of Freight.*

### EJECTION.

*See Carriers of Passengers.*

### EMINENT DOMAIN.

Damages not allowed where no part of premises is taken, 737.

**EMINENT DOMAIN—Cont'd.****View by Jury.**

- General rule as to effect, 691.
- Impression produced by, not part of evidence, 693.
- Impression produced by, is part of evidence, 693.
- Statutory provisions, 694.

**ESTOPPEL.**

*See Ultra Vires.*

**EVIDENCE.**

*See Eminent Domain.*

- Evidence to show custom of servants to disregard rules inadmissible, 431.
- Expert evidence as to proper position of brakeman on a train, 481.
- View by jury as, 693.

**EXPERT EVIDENCE.**

*See Evidence.*

**FELLOW SERVANTS.**

- Criterion, 420.
- Roadmasters as, 420.
- Who are, 415.

**FENCES.**

- Effect of contributory negligence in action for injury to stock caused by failure to fence, 750.

**FORECLOSURE.**

*See Mortgages.*

**FRANCHISES.****Forfeiture.**

- Abandonment of road, 624.
- Absence from state, 623.
- Cannot be taken advantage of collaterally, 628.
- Failure to construct road, 623.
- Failure to operate road, 624.
- Failure to pay stock subscription not ground for, 625.
- Forfeiture must be judicially ascertained where nonuser or misuser is the ground, 625.
- Non-residence of officers and directors, 623.
- Nonuser or misuser, 622.

**FRANCHISES—Continued.**

- Nonuser or misuser must be positive and wilful act, 624.
- Parties, 627.
- Power of court to appoint receiver in adjudging, 628.
- Statutory declaration of, 626.
- Suing in Federal court not ground for, 625.
- Transfer and sale of property, 624.
- Waiver by state, 629.

**GRAVEL PITS.**

*See Railroads.*

**INSPECTION.**

*See Master and Servant.*

**MASTER AND SERVANT.**

*See Fellow Servants.*

- Assumption of risk, 420.
- Assumption of risk from violation of statutory duty by master, 513.
- Ballasting side tracks, duty of master as to, 428.
- Expert evidence as to proper position of brakeman on train, 481.
- Inspection of cars, 480.
- Inspection of foreign cars, 481.
- Inspection of cars—liability of transferring company, 485.
- Liability for injury to servant by negligence of another company, 480.
- Rules.

- Evidence inadmissible to show custom to disregard, 431.
- Servant's knowledge of rules, 430.
- Waiver by conductor, 431.
- Waiver of, by master, 430.

**Volunteers.**

- Liability for injury to, 442.
- Liability for injury to servant voluntarily acting outside of scope of employment, 445.

**MORTGAGES.**

- After-acquired property, 560.
- Power of railroad to mortgage corporate property, 560.

**MORTGAGES—Continued.**

Purchasers at foreclosure sale not liable for debts of old company, 650.

**MUNICIPAL AID.**

Effect of consolidation on subscription, 748.

**NEGLIGENCE.**

Accidents giving rise to presumption of, 240.  
Presumption of, 240.  
Presumption of, from injury to passenger in collision between trains, 240.

**PARTIES.**

*See Actions.*

**PROXIMATE CAUSE.**

Delay of carrier in shipping freight as, 272.

**RAILROADS.**

Estoppel to set up ultra vires as defence to executed contract, 348.  
Formation of "new line," 379.  
Liability for ultra vires torts, 676.  
Mortgages, 560.  
Mortgages of after-acquired property, 560.  
Power to run hotel, 257.  
Purposes for Which Land May Be Acquired.  
Additional tracks on whole line, 258.  
Channel to change course of steam, 259.  
Depots, stations and station grounds, 258.  
Dumping ground for waste earth, 258.  
Erection of telegraph lines along right of way, 258.  
General rule, 257.  
Repair shops, 258.  
Springs to supply tanks, 258.  
Spur track, 258.  
Stock yards, 258.  
Turnouts and extra tracks, 258.  
Viaducts and approaches, 258.

**RAILROADS—Continued.****Purposes for Which Land May Not Be Acquired.**

Branch road, in absence of charter provision, 259.  
Bridges and approaches, 261.  
Collateral enterprises and facilitation of prospective business, 259.  
Dwellings of employees, 260.  
Gravel pits, 260.  
Railroad for carriage of sight-seers, 260.  
Shops for manufacture of rolling stock, 260.  
Storage of boats for patrons, 260.  
Temporary right of way during construction of main line, 259.  
Wharves at terminus, 260.

**RATES.**

*See Carriers of Freight.*

**RECEIVERS.**

Appointment of, to preserve rents and profits, 560.  
Power of court to appoint in adjudging forfeiture of corporate franchises, 628.

**REPAIR SHOPS.**

*See Railroads.*

**RULES.**

*See Master and Servant.*

**SPUR TRACKS.**

*See Railroads.*

**STATIONS AND DEPOTS.**

Power of railroad to acquire land for grounds, 258.

**STATUTES.**

Forfeiture of franchise declared by, 626.  
Provisions as to view by jury in condemnation proceedings, 694.



**STOCK.**

Failure to pay subscription as ground for forfeiture of franchise of railroad, 625.

**STOCK, INJURIES TO.**

*See Fences.*

**STOCK YARDS.**

Power of railroad to acquire land for, 258.

**TICKETS AND FARES.**

Conditions as to Stamping and Identification.

Absence of agent, 658.

Effect as to purchaser, 655.

Effect of failure to comply, 658.

Refusal of agent to stamp, 659.

Reasonableness, 654.

Validity, 655.

Waiver of condition, 657.

**TICKETS AND FARES—Cont'd**

Stopover privileges under agreement with agent, 157.

**TORTS.**

Liability of railroad for ultra vires torts, 676.

**ULTRA VIRES.**

Estoppel, 348.

Liability of railroads for ultra vires torts, 676.

**VIEW.**

*See Eminent Domain.*

**VOLUNTEERS.**

*See Master and Servant.*

**WAIVER.**

*See Franchises.*

*Master and Servant.*

**WAREHOUSEMAN.**

*See Carriers of Freight.*

## GENERAL INDEX.

### ACT OF GOD.

- Heavy dew not.  
Missouri, K. & T. Ry. Co. v.  
Truskett (Ind. Terr.), 273.

### ACTIONS.

- Action for negligence may be based on statute prescribing penalty on carrier for failure to care for live stock in transit.  
Burns v. Chicago, M. & St. P. Ry. Co. (Wis.), 290.

- Effect of assumption of risk in action under penal statute.

- Narramore v. Cleveland, C., C. & St. L. Ry. Co. (C. C. A.), 502.

- Jurisdiction of proceeding for forfeiture of franchise.

- Eel River R. Co. *et al.* v. State *ex rel.* Kistler, Pros. Atty., (Ind.), 595.

- Parties as affected by change of venue of action to forfeit railroad franchises.

- Eel River R. Co. *et al.* v. State *ex rel.* Kistler, Pros. Atty., (Ind.), 595.

### AGENTS.

- Evidence as to authority of.  
Bigelow v. Chicago, B. & N. Ry. Co. (Wis.), 341.

### APPEAL.

- Effect on supreme court of decision by city court of appeals.  
Paddock v. Missouri Pac. Ry. Co. (Mo.), 310.

#### Rehearing.

- Blair v. Sioux City & P. Ry. Co. *et al.* (Iowa), 363.

#### Review.

- Central of Georgia Ry. Co. v. Bond (Ga.), 757.
- Illinois Cent R. Co. v. Griffin (Ill.), 767.
- Kay v. Glade Creek & R. R. Co. (W. Va.), 695.

### APPEAL—Continued.

- Louisville & N. R. Co. v. Blair (Tenn.), 159.
- St. Louis & S. F. R. Co. v. Kilpatrick (Ark.), 212.
- Smith v. Norfolk & W. Ry. Co. (W. Va.), 108.
- Trimble v. New York Cent. & H. R. R. Co. (N. Y.), 176.
- Review of instructions.  
Central of Georgia Ry. Co. v. Bond (Ga.), 757.

### ASSAULT.

- Company liable for assault on passenger by conductor.  
Smith v. Norfolk & W. Ry. Co. (W. Va.), 108.

### ATTACHMENT.

- See Witnesses.*

### ATTORNEY'S FEES.

- Missouri statute requiring railroads to pay attorney's fee in addition to damages recovered for injuries to live stock in transit is unconstitutional.  
Paddock v. Missouri Pac. Ry. Co. (Mo.), 310.

### BAGGAGE.

- See Carriers of Passengers.*

### BILLS OF LADING.

- See Carriers of Freight.*

### CARRIERS OF FREIGHT.

#### Bills of Lading.

- Stipulation exempting carrier where shipper fails to give notice of loss is valid.  
St. Louis & S. F. R. Co. v. Hurst (Ark.), 324.

#### Carriage of Live Stock.

- Action for negligence may be based on statute prescribing

**CARRIERS OF FREIGHT—***Continued.*

- penalty for failure to care for stock in transit.
- Burns v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 290.
- Carrier's duty where shipper makes special contract to care for stock.
- Burns v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 290.
- Contract that injury to stock in transit shall be presumed to have been caused by shipper's negligence is valid where there was a consideration.
- Paddock v. Missouri Pac. Ry. Co. (Mo.)*, 310.
- Contributory negligence of shipper in failing to unload and care for stock at a certain point is a question for jury.
- Burns v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 290.
- Damages recoverable under Missouri statute.
- Paddock v. Missouri Pac. Ry. Co. (Mo.)*, 310.
- Effect of written contract signed by shipper in ignorance of its contents after car is about to start.
- Louisville & N. R. Co. v. Cooper (Ky.)*, 304.
- Elements of damages in action to recover for delay in transportation of live stock.
- Missouri, K. & T. Ry. Co. v. Truskett (Ind. Terr.)*, 273.
- Heavy dew not sufficient to relieve carrier from liability for delay in transportation of live stock.
- Missouri, K. & T. Ry. Co. v. Truskett (Ind. Terr.)*, 273.
- Injury to stock in transit where shipper has made special contract to care for them.
- Burns v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 290.
- Liability of receivers under statute imposing penalty for cruelty to animals in transit.
- United States v. Harris et al. (U. S.)*, 582.

**CARRIERS OF FREIGHT—***Continued.*

- Missouri statute requiring railroads to pay attorney's fee in addition to damages recovered for injuries to live stock in transit is unconstitutional.
- Paddock v. Missouri Pac. Ry. Co. (Mo.)*, 310.
- Question whether injury to stock was caused by mixed shipment or by failure to provide trapdoor for car is for jury.
- Paddock v. Missouri Pac. Ry. Co. (Mo.)*, 310.
- "Shipping condition" of stock.
- Felton v. Clarkson (Tenn.)*, 300.
- Carrier estopped to plead that contract for shipment of freight was ultra vires in an action to recover for its failure to carry out such contract.
- Bigelow v. Chicago, B. & N. Ry. Co. (Wis.)*, 341.
- Connecting Carriers.**
  - Liability of connecting carrier for through shipment.
  - Louisville & N. R. Co. v. Cooper (Ky.)*, 304.
  - Liability of initial carrier for delay.
  - Louisville & N. R. Co. v. Farmers' & Drovers' Live-Stock Commission Firm (Ky.)*, 284.
  - Negligence of initial carrier is question for jury.
  - Louisville & N. R. Co. v. Farmers' & Drovers' Live-Stock Commission Firm (Ky.)*, 284.
  - Validity of stipulation by initial carrier against liability.
  - Louisville & N. R. Co. v. Farmers' & Drovers' Live-Stock Commission Firm (Ky.)*, 284.
- Contract for carriage of freight.
- Bigelow v. Chicago, B. & N. Ry. Co. (Wis.)*, 341.

# **CARRIERS OF FREIGHT—**

*Continued.*

## **Delivery.**

What constitutes.

Dixon *et al.* v. Central of Georgia Ry. Co. (Ga.), 380.

Liability for damage caused by failure to properly ice refrigerator cars.

New York, P. & N. R. Co. v. Cromwell (Va.), 328.

Measure of damages for injury to goods by fire while negligently delayed by carrier.

Yazoo & M. V. R. Co. v. Millsaps *et al.* (Miss.), 269.

Measure of damages in action for breach of contract for carriage of goods.

Bigelow v. Chicago, B. & N. Ry. Co. (Wis.), 341.

Negligent delay of carrier not proximate cause of injury to goods damaged by fire.

Yazoo & M. V. R. Co. v. Millsaps *et al.* (Miss.), 269.

Transportation service and transfer service distinguished.

Dixon *et al.* v. Central of Georgia Ry. Co. (Ga.), 380.

When relation of carrier and shipper begins.

Dixon *et al.* v. Central of Georgia Ry. Co. (Ga.), 380.

## **Express Companies.**

Express companies may compel shipper to affix revenue stamp.

American Exp. Co. v. Maynard, Atty. Gen., (U. S.), 530.

Mandamus to compel carrier to affix revenue stamp.

American Exp. Co. v. Maynard, Atty. Gen., (U. S.), 530.

## **Misdelivery.**

Oskamp *et al.* v. Southern Exp. Co. (Ohio), 334.

## **Rates.**

Applicability of Iowa statute prohibiting extortion and discrimination to joint freight rates.

Blair v. Sioux City & P. Ry. Co. *et al.* (Iowa), 363.

# **CARRIERS OF FREIGHT—**

*Continued.*

Mode of determining reasonableness of.

Chicago, M. & St. P. Ry. Co. v. Tompkins *et al.* (U. S.), 349.

One executing contract with city cannot claim benefit of reduced rate granted city.

Dixon *et al.* v. Central of Georgia Ry. Co. (Ga.), 380.

Time-tables as notice to shipper of delays.

Burns v. Chicago, M. & St. P. Ry. Co. (Wis.), 290.

## **Warehouseman.**

Liability as.

Georgia & A. Ry. Co. v. Pound (Ga.), 398.

Lien for storage charges.

Dixon *et al.* v. Central of Georgia Ry. Co. (Ga.), 381.

Sufficiency of evidence to prove custom changing carrier's liability as.

Georgia & A. Ry. Co. v. Pound (Ga.), 398.

Usages and customs as affecting carrier's liability as.

Georgia & A. Ry. Co. v. Pound (Ga.), 398.

# **CARRIERS OF LIVE STOCK.**

*See Carriers of Freight.*

# **CARRIERS OF PASSENGERS.**

Authority of conductor to grant stop-over privileges.

International & G. N. R. Co. *et al.* v. Best *et al.* (Tex.), 153.

## **Baggage.**

Delivering baggage earlier than necessary.

Goldberg *et al.* v. Ahnapee & W. Ry. Co. (Wis.), 65.

Evidence as to rule requiring baggage master to exact release of liability from drummers as condition precedent to checking trunks.

Trimble v. New York Cent. & H. R. R. Co. (N. Y.), 176.

**CARRIERS OF PASSENGERS**

—Continued.

- Liability for baggage stored for transportation.
  - Bader *v.* Southern Pac. R. Co. (La.), 60.
- Liability for loss on connecting lines.
  - Lessard *v.* Boston & M. R. R. (N. H.), 211.
- Reasonable time for delivering baggage.
  - Goldberg *et al.* *v.* Ahnapee & W. Ry. Co. (Wis.), 65.
- Right of drummer employer to recover for loss of sample trunk.
  - Trimble *v.* New York Cent. & H. R. R. Co. (N. Y.), 176.
- Care required.
  - Louisville & N. R. Co. *v.* Scott's Adm'r (Ky.), 261.
- Care required of passenger crossing intervening tracks of platform.
  - Chesapeake & O. Ry. Co. *v.* King (C. C. A.), 167.
- Construction of Nebraska statute creating liability in absence of negligence.
  - Chicago R. I. & P. R. I. Co. *v.* Zerneck (Neb.), 76.
- Contract exempting carriers from liability for injury to express messenger valid.
  - Baltimore & O. S. W. Ry. Co. *v.* Voigt (U. S.), 111.
- Contributory Negligence.
  - Contributory negligence of passenger on freight train in leaving seat, is question for jury.
    - St. Louis & S. F. R. Co. *v.* Burrows (Kan.), 678.
  - Duty of, to person riding on freight train by sufferance of trainmen.
    - Dalton's Adm'r *v.* Louisville & N. R. Co. (Ky.), 768.
  - Duty of passenger to pay fare of his minor child.
    - Braun *v.* Northern Pac. Ry. Co. (Minn.), 139.
    - Warfield *v.* Louisville & N. R. Co. (Tenn.), 135.

**CARRIERS OF PASSENGERS**

—Continued.

- Duty to protect passenger from other passengers.
  - Louisville & N. R. Co. *v.* McEwan (Ky.), 208.
- Ejection.
  - Carrier liable where servant uses unnecessary force.
    - Haver *v.* Central R. Co. of N. J. (N. J.), 490.
  - Damages.
    - Louisville & N. R. Co. *v.* Blair (Tenn.), 159.
  - Ejection of passenger for having unstamped ticket who entered on conductor's invitation.
    - International & G. N. R. Co. *et al.* *v.* Beat *et al.* (Tex.), 153.
  - Ejection of passenger who has failed to comply with conditions in tickets.
    - Dangerfield *v.* Atchison, T. & S. F. Ry. Co. (Kan.), 650.
  - Employee's authority need not be proven in action for malicious ejection.
    - St. Louis & S. F. R. Co. *v.* Kilpatrick (Ark.), 212.
  - Excessive damages for.
    - Chamberlain *v.* Lake Shore & M. S. Ry. Co. (Mich.), 241.
  - Minor passenger may be ejected for failure to pay fare for child accompanying her.
    - Warfield *v.* Louisville & N. R. Co. (Tenn.), 135.
  - Passenger wrongfully ejected must not increase damages.
    - Bader *v.* Southern Pac. R. Co. (La.), 60.
  - Proximate cause of injury.
    - St. Louis & S. F. R. Co. *v.* Kilpatrick (Ark.), 212.
  - Records of former suit as evidence in action for.
    - Chamberlain *v.* Lake Shore & M. S. Ry. Co. (Mich.), 241.
  - Returning of fare to passenger whose minor child has been ejected.

**CARRIERS OF PASSENGERS***—Continued.*

- Braun *v.* Northern Pac. Ry. Co. (Minn.), 139.  
 Right to eject passenger for failure to pay fare for his minor child.  
 Braun *v.* Northern Pac. Ry. Co. (Minn.), 139.  
 Intoxication not contributory negligence per se.  
 Trumbull *v.* Erickson (C. C. A.), 93.  
 Liability of company for assault on passenger by conductor.  
 Smith *v.* Norfolk & W. Ry. Co. (W. Va.), 108.  
 Liability of railroad for injury to passenger crossing intervening track to platform.  
 Chesapeake & O. Ry. Co. *v.* King (C. C. A.), 167.  
 Mail clerks may rely on rules as to movement of train near station.  
 Chicago & A. R. Co. *v.* Kelly (Ill.), 52.  
 Nebraska statute giving right of action for injured passenger construed.  
 Chicago R. I. & P. R. I. Co. *v.* Zerneck (Neb.), 76.  
 Negligence of employees though performing ultra vires agreement of carrier renders it liable.  
 Chesapeake & O. Ry. Co. *v.* Howard *et al.* (U. S.), 660.  
 Notice to carrier as to contents of trunk.  
 Trimble *v.* New York Cent. & H. R. R. Co. (N. Y.), 176.  
 Power to grant exclusive privileges to local carriers at station.  
 Hedding *v.* Gallagher *et al.* (N. H.), 192.  
 Presumption of negligence from derailment of train.  
 Chicago R. I. & P. R. I. Co. *v.* Zerneck (Neb.), 76.  
 Presumption of negligence for injury to.  
 Felton *v.* Holbrook (Ky.), 146.

**CARRIERS OF PASSENGERS***—Continued.*

- Presumption of negligence from injury to passenger.  
 St. Louis & S. F. R. Co. *v.* Burrows (Kan.), 678.  
 Spencer *v.* Chicago, M. & St. Ry. Co. (Wis.), 163.  
 Presumption of negligence where injury is caused by collision between trains.  
 Baltimore & O. S. W. Ry. Co. *v.* Hausman (Ky.), 237.  
 Punitive damages for injury to passenger while alighting.  
 Glover *v.* Charleston & S. Ry. Co. (S. Car.), 102.  
 Purchase of ticket not prerequisite to relation of passenger under Arkansas statute.  
 St. Louis & S. F. R. Co. *v.* Kilpatrick (Ark.), 212.  
 Railway mail clerk not a passenger within meaning of Pennsylvania statute.  
 Foreman *v.* Pennsylvania R. Co. (Pa.), 246.  
 Running freight train past station at high rate of speed while passengers are alighting from another train is negligence.  
 Chicago & A. R. Co. *v.* Kelly (Ill.) 52.  
 Separate coach statute construed.  
 Brown *v.* State (Ga.), 247.  
 Servant riding gratuitously by permission of conductor is passenger.  
 Louisville & N. R. Co. *v.* Scott's Adm'r (Ky.), 261.  
 Sleeping Car Company.  
 Liability for theft of passenger's property.  
 Pullman Palace-Car Co. *v.* Hunter (Ky.), 204.  
 Standing on platform of crowded car not contributory negligence.  
 Trumbull *v.* Erickson (C. C. A.), 93.  
 Statute requiring passenger trains to stop at county seats a

**CARRIERS OF PASSENGERS CONTRACTS.**

—*Continued.*

burden upon interstate commerce.

Cleveland, C., C. & St. L. Ry. Co. v. People of State of Illinois *ex rel.* Jett. (U. S.), 227.

Where imperfect wheel caused an accident which results in injury to a passenger the question of the carrier's negligence is for the jury.

Chesapeake & O. Ry. Co. v. Howard *et al.* (U. S.), 660.

Yielding seat to infirm passenger not contributory negligence.

Trumbull v. Erickson (C. C. A.), 93.

**COLLISIONS.**

*See Negligence.*

**CONNECTING CARRIERS.**

*See Carriers of Freight.*

**CONSOLIDATION.**

*See Taxation.*

**CONSTITUTIONAL LAW.**

*See Statutes.*

Constitutionality of Nebraska statute rendering carriers of passengers liable in the absence of negligence.

Chicago, R. I. & P. R. I. Co. v. Zernecke (Neb.), 76.

Constitutionality of statutes.

Chicago, R. I. & P. R. I. Co. v. Zernecke (Neb.), 76.

Provision of Georgia constitution for compensation in condemnation proceedings construed.

Austin v. Augusta T. Ry. Co. (Ga.), 711.

Provision of South Carolina statute as to fellow servant construed.

Rutherford v. Southern Ry. Co. (S. Car.), 520.

**CONTINUANCE.**

*See Trial.*

*See Carriers of Freight.*

Validity of contracts granting exclusive privileges at stations.

Hedding v. Gallagher *et al.* (N. H.), 192.

**CONTRIBUTORY NEGLIGENCE.**

*See Carriers of Passengers.*

*Master and Servant.*

Contributory negligence of passenger crossing track to board train a question for jury.

Beecher v. Long Island R. Co. (N. Y.), 199.

Contributory negligence of shipper in failing to unload and care for his stock at a certain point is a question for jury.

Burns v. Chicago, M. & St. P. Ry. Co. (Wis.), 290.

In action for injury to stock under Wisconsin statute, contributory negligence is not a defence.

Cole v. Duluth, S. S. & A. Ry. Co. (Wis.), 749.

Question for jury.

Chesapeake & O. Ry. Co. v. King (C. C. A.), 167.

Chicago & A. R. Co. v. Kelly (Ill.), 52.

Violation of rule prohibiting servants from going between cars to couple them is contributory negligence.

Fluhrer v. Lake Shore & M. S. Ry. Co. (Mich.), 463.

**CROSSINGS.**

Failure to give signal where person injured knew train was approaching, not negligence.

Louisville & N. R. Co. v. Penrod's Adm'r (Ky.), 759.

**Farm Crossings.**

Duty to close gates.

Mooers v. Northern Pac. Ry. Co. (Minn.), 753.

Swanson v. Chicago, M. & St. P. Ry. Co. (Minn.), 753.

**CROSSINGS—Continued.**

Implied invitation to public to use private crossing renders company liable for injury caused by defect therein.  
*Southern Ry. Co. v. Hooper* (Ga.), 752.

Liability of company for injury resulting to pedestrian from gateman's attempt to save him from apparent danger.  
*McAnally v. Pennsylvania R. Co.* (Pa.), 741.

Signals not intended for protection of person on track for his own convenience elsewhere than at crossing.  
*Huff v. Chesapeake & O. Ry. Co.* (W. Va.), 767.

**DAMAGES.**

*See Eminent Domain.*

Elements of, in action to recover for delay in transportation of live stock.

*Missouri, K. & T. Ry. Co. v. Truskett* (Ind. Terr.), 273.

Excessive damages in action for ejection of passenger.  
*Chamberlain v. Lake Shore & M. S. Ry. Co.* (Mich.), 241.

Excessive verdict.

*Baltimore & O. S. W. Ry. Co. v. Hausman* (Ky.), 237.

*Fluhrer v. Lake Shore & M. S. Ry. Co.* (Mich.), 463.

*Louisville & N. R. Co. v. McEwan* (Ky.) 208.

Excessive verdict in action for death by wrongful act.

*Louisville & N. R. Co. v. Scott's Adm'r* (Ky.), 261.

Damages recoverable under Missouri statute for injuries to live stock in transit.

*Paddock v. Missouri Pac. Ry. Co.* (Mo.), 310.

Instructions in action to recover for wrongful death.

*Chicago & A. R. Co. v. Kelly* (Ill.), 52.

Interest.

*Missouri, K. & T. Ry. Co. v. Truskett* (Ind. Terr.), 273.

**DAMAGES—Continued.**

Interest on damages recovered under penal statute.

*Blair v. Sioux City & P. Ry. Co. et al.* (Iowa), 363.

Lex loci controls in distribution of.

*Texas & P. Ry. Co. v. Humble* (C. C. A.), 83.

Measure of, in action for breach of contract for carriage of goods.

*Bigelow v. Chicago, B. & N. Ry. Co.* (Wis.), 341.

Measure of, in action for death of husband.

*Central of Georgia Ry. Co. v. Bond* (Ga.), 757.

Measure of, in action for loss caused by fire.

*Lake Erie & W. R. Co. v. Falk et al.* (Ohio), 751.

Measure of damages for injury to goods by fire while negligently delayed by carrier.

*Yazoo & M. V. R. Co. v. Millsaps et al.* (Miss.), 269.

Passenger wrongfully ejected must not increase damages.  
*Bader v. Southern Pac. R. Co.* (La.), 60.

Pleading.

*Glover v. Charleston & S. Ry. Co.* (S. Car.), 102.

Punitive damages.

*Glover v. Charleston & S. Ry. Co.* (S. Car.), 102.

Punitive damages cannot be recovered of master for wanton or malicious act of servant.

*Haver v. Central R. Co. of N. J.* (N. J.), 490.

Punitive damages for injury to passenger caused by gross negligence.

*Felton v. Holbrook* (Ky.), 146.

Recovery by married women.

*Texas & P. Ry. Co. v. Humble* (C. C. A.), 83.

Remittitur.

*Blair v. Sioux City & P. Ry. Co. et al.* (Iowa), 363.

Wrongful ejection.

*Louisville & N. R. Co. v. Blair* (Tenn.), 159.



**DEATH BY WRONGFUL ERROR.****AOT.**

Extraterritorial effect of Missouri statute giving right of action for.

*Matheson et al. v. Kansas City, Ft. S. & M. R. Co.* (Kan.), 738.

Measure of damages in action for death of husband.

*Central of Georgia Ry. Co. v. Bond* (Ga.), 757.

Pleading negligence.

*Sims v. Western & A. R. Co.* (Ga.), 756.

Presumption of negligence.

*Sims v. Western & A. R. Co.* (Ga.), 756.

**DEEDS.**

Parol evidence to explain intent of.

*Abraham v. Oregon & C. R. Co. et al.* (Ore.), 250.

**EJECTION.**

*See Carriers of Passengers. Trespassers.*

**EMINENT DOMAIN.****Damages.**

Danger of fire.

*Kay v. Glade Creek & R. R. Co.* (W. Va.), 695.

Georgia constitution construed.

*Austin v. Augusta T. Ry. Co.* (Ga.), 711.

Opinion evidence.

*Kay v. Glade Creek & R. R. Co.* (W. Va.), 695.

Physical interference necessary to warrant recovery.

*Austin v. Augusta T. Ry. Co.* (Ga.), 711.

Railroad not required to pay for structures erected on land by it prior to condemnation.

*Seattle & M. R. Co. v. Corbett* (Wash.), 709.

View by jury as evidence.

*Chicago, R. I. & P. Ry. Co. v. Farwell* (Neb.), 687.

*See Harmless Error.*

Assignments of.

*Felton v. Clarkson* (Tenn.), 300.

**ESTOPPEL.**

*See Ultra Vires.*

*Dangerfield v. Atchison, T. & S. F. Ry. Co.* (Kan.), 650.

Estoppel to deny legality of railroad aid tax.

*Vicksburg, S. & P. R. Co. v. Scott, Sheriff, et al.* (La.), 745.

**EVIDENCE.**

Action to recover for injury to servant.

*Konold v. Rio Grande W. Ry. Co.* (Utah), 450.

Admissibility of evidence to sustain character of witness who has been impeached.

*Warfield v. Louisville & N. R. Co.* (Tenn.), 135.

Admissibility of rule of post-office department in action to recover for death of mail clerk.

*Chicago & A. R. Co. v. Kelly* (Ill.), 52.

Admissibility of rule requiring baggage masters to exact release of liability from drummers as condition precedent to checking sample trunks.

*Trimble v. New York Cent. & H. R. R. Co.* (N. Y.), 176.

Authority of agent.

*Bigelow v. Chicago, B. & N. Ry. Co.* (Wis.), 341.

Complaints as evidence of existing pain.

*St. Louis & S. F. R. Co. v. Burrows* (Kan.), 678.

Evidence of other acts of negligence.

*Konold v. Rio Grande W. Ry. Co.* (Utah), 450.

Experiments.

*Konold v. Rio Grande W. Ry. Co.* (Utah), 450.

Expert testimony.

*Missouri, K. & T. Ry. Co. et al. v. Merrill* (Kan.), 471.

**EVIDENCE—Continued.**

Fact that employee was not aware that he was violating ordinance cannot be shown.

Central of Georgia Ry. Co. v. Bond (Ga.), 757.

Hearsay evidence.

Illinois Cent. R. Co. v. Griffin (Ill.), 767.

Horse's disposition.

Illinois Cent. R. Co. v. Griffin (Ill.), 767.

Market reports as evidence in action to recover for delay in carriage of live stock.

Missouri, K. & T. Ry. Co. v. Truskett (Ind. Terr.), 273.

Opinion evidence.

Central of Georgia Ry. Co. v. Bond (Ga.), 757.

Opinion evidence as to damages in condemnation proceedings.

Kay v. Glade Creek & R. R. Co. (W. Va.), 695.

Ordinances.

Central of Georgia Ry. Co. v. Bond (Ga.), 757.

Parol evidence as to distinction between transportation service and transfer service.

Dixon *et al.* v. Central of Georgia Ry. Co. (Ga.), 380.

Parol evidence to explain deed.

Abraham v. Oregon & C. R. Co. *et al.* (Ore.), 250.

Parol testimony.

Goldberg *et al.* v. Ahnapee & W. Ry. Co. (Wis.), 65.

Parol testimony to prove contents of placard.

St. Louis & S. F. R. Co. v. Kilpatrick (Ark.), 212.

Records of former suit as, in action for ejection of passenger.

Chamberlain v. Lake Shore & M. S. Ry. Co. (Mich.), 241.

Sufficiency of.

Burns v. Chicago, M. & St. P. Ry. Co. (Wis.), 290.

Foreman v. Pennsylvania R. Co. (Pa.), 246.

Spencer v. Chicago, M. & St. Ry. Co. (Wis.), 163.

Sufficiency of, to prove custom

**EVIDENCE—Continued.**

changing carrier's liability as warehouseman.

Georgia & A. Ry. Co. v. Pound (Ga.), 398.

View by jury in condemnation proceedings,  
Chicago, R. I. & P. Ry. Co. v. Farwell (Neb.), 687.

**EXCEPTIONS.**

Mistake in indorsing bill.

Atchison, T. & S. F. Ry. Co. v. Young (Ind. Terr.), 645.

**EXPERIMENTS.**

*See Evidence.*

**EXPERT EVIDENCE.**

*See Evidence.*

**EXPRESS MESSENGERS.**

*See Carriers of Passengers.*

**EXPRESS COMPANIES.**

*See Carriers of Freight.*

**FARM CROSSINGS.**

*See Crossings.*

**FEDERAL COURTS.**

Jurisdiction.

American Exp. Co. v. Maynard, Atty. Gen., (U. S.), 530.

State statute regulating admission as to evidence of absent witness may be taken advantage of in federal court.

Texas & P. Ry. Co. v. Humble (C. C. A.), 83.

**FELLOW SERVANTS.**

Assumption of risk of negligence of.

O'Neill v. Great Northern Ry. Co. (Minn.), 415.

Minnesota statute not applicable to case where servant was injured by fall of coal dislodged from tender by fellow servant.

Weisel v. Eastern Ry. Co. of Minn. (Minn.), 446.

**FELLOW SERVANTS—Cont'd.**

Negligence of, concurring with negligence of master.

Fuhrer *v.* Lake Shore & M. S. Ry. Co. (Mich.), 463.

Provision of South Carolina statute as to, construed.

Rutherford *v.* Southern Ry. Co. (S. Car.), 520.

Roadmaster and laborer.

O'Neill *v.* Great Northern Ry. Co. (Minn.), 415.

Servants in different departments.

Dobson *v.* New Orleans & W. R. Co. (La.), 404.

Wisconsin statute as to, construed.

Medberry *v.* Chicago, M. & St. P. Ry. Co. (Wis.), 494.

**FENCES.**

Contributory negligence no defense to action for injury to stock under Wisconsin statute.

Cole *v.* Duluth, S. S. & A. Ry. Co. (Wis.), 749.

Failure to fence land used for depot grounds.

Cole *v.* Duluth, S. S. & A. Ry. Co. (Wis.), 749.

**FIRES.**

Damages recoverable for.

Lake Erie & W. R. Co. *v.* Falk *et al.* (Ohio), 751.

Liability of railroad absolute under Ohio statute.

Lake Erie & W. R. Co. *v.* Falk *et al.* (Ohio), 751.

Subrogation of insurer.

Lake Erie & W. R. Co. *v.* Falk *et al.* (Ohio), 751.

**FORFEITURE.**

*See Railroads.*

**FRIGHTENING HORSES.**

Driver's care a question for jury.

Illinois Cent. R. Co. *v.* Griffin (Ill.), 767.

Evidence of horse's disposition.

Illinois Cent. R. Co. *v.* Griffin (Ill.), 767.

Railroads in Streets.

Care required of railroad.

**FRIGHTENING HORSES—Continued.**

Louisville & N. R. Co. *v.* Penrod's Adm'r (Ky.), 759.

Signals.

Louisville & N. R. Co. *v.* Penrod's Adm'r (Ky.), 759.

Railway company piling cinders on public highway near crossing in such a way as to frighten horses is guilty of negligence.

Illinois Cent. R. Co. *v.* Griffin (Ill.), 767.

**HARMLESS ERROR.**

Harmless error.

Goldberg *et al.* *v.* Ahnapee & W. Ry. Co. (Wis.), 65.

Louisville & N. R. Co. *v.* Farmers' & Drovers' Live-Stock Commission Firm (Ky.), 284.

Missouri, K. & T. Ry. Co. *v.* Truskett (Ind. Terr.), 273.

Warfield *v.* Louisville & N. R. Co. (Tenn.), 135.

**HOTELS.**

Maintenance of, not a railroad purpose, as matter of law.

Abraham *v.* Oregon & C. R. Co. *et al.* (Ore.), 250.

**IMPEACHMENT.**

*See Witnesses.*

**INSOLVENCY.**

*See Railroads.*

**INSPECTION.**

*See Master and Servant.*

**INSTRUCTIONS.**

Carrier *v.* Union Pac. Ry. Co. (Kan.), 513.

Chicago & A. R. Co. *v.* Kelly (Ill.), 52.

Felton *v.* Clarkson (Tenn.), 300.

Konold *v.* Rio Grande W. Ry. Co. (Utah), 450.

Missouri, K. & T. Ry. Co. *et al.* *v.* Merrill (Kan.), 471.

Rutherford *v.* Southern Ry. Co. (S. Car.), 520.

St. Louis & S. F. R. Co. *v.* Burrows (Kan.), 678.

**INSTRUCTIONS—Continued.**

- Southern Ry. Co. *v.* Hooper  
(Ga.), 752.  
Texas & P. Ry. Co. *v.* Humble  
(C. C. A.), 83.  
Warfield *v.* Louisville & N. R.  
Co. (Tenn.), 135.  
Abrogation of rules.  
Konold *v.* Rio Grande W. Ry.  
Co. (Utah), 450.  
Contributory negligence.  
Illinois Cent. R. Co. *v.* Griffin  
(Ill.), 767.  
Damages in action for wrongful  
death.  
Chicago & A. R. Co. *v.* Kelly  
(Ill.), 52.  
Discretion of court as to.  
St. Louis & S. F. R. Co. *v.*  
Kilpatrick (Ark.), 212.  
Review of, on appeal.  
Central of Georgia Ry. Co. *v.*  
Bond (Ga.), 757.

**INSURANCE.**

*See Fires.*

**INTEREST.**

*See Damages.*

**INTERROGATORIES.**

*See Railroads.*

**INTERSTATE COMMERCE.**

*See Taxation.*

- Statute requiring passenger  
trains to stop at county seats a  
burden upon interstate com-  
merce.  
Cleveland, C., C. & St. L. Ry.  
Co. *v.* People of State of  
Illinois *ex rel.* Jett (U. S.),  
227.

**INTOXICATION.**

*See Contributory Negligence.*

- Trumbull *v.* Erickson (C. C.  
A.), 93.

**JURISDICTION.**

*See Federal Courts.*

Waiver.

- Eel River R. Co. *et al.* *v.* State  
*ex rel.* Kistler, Pros. Atty.,  
(Ind.), 595.

**JURY.**

*See Trial.*

**LEASES.**

- Construction of statute allowing.  
Eel River R. Co. *et al.* *v.* State  
*ex rel.* Kistler, Pros. Atty.,  
(Ind.), 595.  
Public policy.  
Eel River R. Co. *et al.* *v.* State  
*ex rel.* Kistler, Pros. Atty.,  
(Ind.), 595.

**LIMITATION OF LIABILITY.**

*See Carriers of Passengers.*

**MAIL CLERKS.**

*See Carriers of Passengers.*

- Not passenger within meaning  
of Pennsylvania statute.  
Foreman *v.* Pennsylvania R.  
Co. (Pa.), 246.

**MANDAMUS.**

- Compelling express companies to  
affix revenue stamps.  
American Exp. Co. *v.* May-  
nard, Atty. Gen., (U. S.),  
530.

**MARRIED WOMEN.**

- Recovery of damages by.  
Texas & P. Ry. Co. *v.* Humble  
(C. C. A.), 83.

**MASTER AND SERVANT.**

*See Fellow Servants.*

- Acceptance of volunteer's serv-  
ices.  
Wagen *v.* Minneapolis & St.  
L. R. Co. (Minn.), 438.  
Assumption of Risk.  
Narramore *v.* Cleveland, C.,  
C. & St. L. Ry. Co. (C. C.  
A.), 502.  
Care required of master as to  
machinery.  
Konold *v.* Rio Grande W.  
Ry. Co. (Utah), 450.  
Defective crossing.  
Fluhrer *v.* Lake Shore & M.  
S. Ry. Co. (Mich.), 463.  
Negligence of fellow servant  
is a risk assumed.  
O'Neill *v.* Great Northern  
Ry. Co. (Minn.), 415.

# **MASTER AND SERVANT—**

*—Continued.*

- Unballasted track.  
Louisville & N. R. Co. *v.*  
Bowcock (Ky.), 421.
- Care required of master as to  
appliances.  
Baldwin *v.* Atlantic City R.  
Co. (N. J.), 486.
- Care required of master as to  
condition of yard-tracks.  
Louisville & N. R. Co. *v.* Ross  
(Ky.), 432.
- Care required of master to dis-  
cover defects in track.  
Louisville & N. R. Co. *v.* Ross  
(Ky.), 432.
- Care required of servant having  
knowledge of defects in track.  
Louisville & N. R. Co. *v.* Ross  
(Ky.), 432.
- Cause of accident by which  
servant was injured is question  
for jury.  
Fluhrer *v.* Lake Shore & M.  
S. Ry. Co. (Mich.), 463.
- Contributory Negligence.  
Going between rails to couple  
cars.  
Carrier *v.* Union Pac. Ry.  
Co. (Kan.), 513.
- Inspection of cars by transfer-  
ring company.  
Glynn *v.* Central R. R. of N.  
J. (Mass.), 482.
- Liability of connecting carriers  
for negligence in loading and  
failure to inspect car causing  
injury to servant.  
Missouri, K. & T. Ry. Co. *et*  
*al. v.* Merrill (Kan.), 470.
- Master not liable for wanton or  
malicious acts of employees.  
McAnally *v.* Pennsylvania R.  
Co. (Pa.), 741.
- Negligence of fellow servant  
concurring with negligence of  
master.  
Fluhrer *v.* Lake Shore & M.  
S. Ry. Co. (Mich.), 463.
- Proximate cause of injury to  
servant.  
Weisel *v.* Eastern Ry. Co. of  
Minn. (Minn.), 446.
- Punitive damages cannot be

*Continued.*

- recovered of master for wanton  
or malicious act of servant.  
Haver *v.* Central R. Co. of N.  
J. (N. J.), 490.
- Rules.  
Abrogation.  
Konold *v.* Rio Grande W.  
Ry. Co. (Utah), 450.
- Car coupler going between  
cars in disobedience of  
orders.  
Louisville & N. R. Co. *v.*  
Bowcock (Ky.), 421.
- Notice of.  
Louisville & N. R. Co. *v.*  
Bowcock (Ky.), 421.
- Violation of rule prohibiting  
servants from going between  
cars to couple them is con-  
tributory negligence.  
Fluhrer *v.* Lake Shore & M.  
S. Ry. Co. (Mich.), 463.
- Waiver by master.  
Louisville & N. R. Co. *v.*  
Bowcock (Ky.), 421.
- Servant choosing dangerous  
method.  
Carrier *v.* Union Pac. Ry. Co.  
(Kan.), 513.
- Volunteers, injuries to.  
Wagen *v.* Minneapolis & St.  
L. R. Co. (Minn.), 438.

## **MORTGAGES.**

- Liability of purchaser at fore-  
closure sale.  
Atchison, T. & S. F. Ry. Co.  
*v.* Young (Ind. Terr.), 645.
- Power of railroad to mortgage  
after-acquired property.  
Central Trust Co. of N. Y. *v.*  
Chattanooga, R. & C. R.  
Co. (C. C. A.), 548.
- Priority over subsequent judg-  
ment creditors.  
Central Trust Co. of N. Y. *v.*  
Chattanooga, R. & C. R.  
Co. (C. C. A.), 548.
- Priority over unsecured credit-  
ors.  
Lackawanna I. & C. Co. *et al.*  
*v.* Farmers' L. & T. Co. *et al.*  
(U. S.), 551.

**MORTGAGES—Continued.**

Right of mortgagee to income after default where corpus is insufficient.

Central Trust Co. of N. Y. v. Chattanooga, R. & C. R. Co. (C. C. A.), 548.

**MUNICIPAL AID.**

*See Taxation.*

**NEGLIGENCE.**

Action for negligence may be based on statute prescribing penalty on carrier for failure to care for live stock in transit. *Burns v. Chicago, M. & St. P. Ry. Co.* (Wis.), 290.

Assumption of risk of fellow servant's negligence.

O'Neill v. Great Northern Ry. Co. (Minn.), 415.

Carrier liable for negligence of servant though he was performing an ultra vires agreement of the carrier.

Chesapeake & O. Ry. Co. v. Howard *et al.* (U. S.), 660.

Contract that injury to stock in transit shall be presumed to have been caused by shipper's negligence is valid where there was a consideration.

Paddock v. Missouri Pac. Ry. Co. (Mo.), 310.

Failure to give signal for crossings where person injured knew train was approaching, not negligence.

Louisville & N. R. Co. v. Penrod's Adm'r (Ky.), 759.

Gross negligence as ground for recovery of punitive damages. *Felton v. Holbrook* (Ky.), 146.

Initial carrier's negligence a question for jury.

Louisville & N. R. Co. v. Farmers' & Drivers' Live-Stock Commission Firm (Ky.), 284.

Negligence of fellow servant concurring with negligence of master.

Fluhrer v. Lake Shore & M. S. Ry. Co. (Mich.), 463.

**NEGLIGENCE—Continued.**

Pleading.

Louisville & N. R. Co. v. Penrod's Adm'r (Ky.), 759.

Pleading negligence in action for wrongful death.

Sims v. Western & A. R. Co. (Ga.), 756.

Presumption of, from derailment of train.

Chicago, R. I. & P. R. Co. v. Zerneck (Neb.), 76.

Presumption of, from injury to passengers.

Felton v. Holbrook (Ky.), 146.

St. Louis & S. F. R. Co. v. Burrows (Kan.), 678.

Spencer v. Chicago, M. & St. Ry. Co. (Wis.), 163.

Presumption of, in action for death for wrongful act.

Sims v. Western & A. R. Co. (Ga.), 756.

Presumption of, where injury is caused to passenger by collision between trains.

Baltimore & O. S. W. Ry. Co. v. Hausman (Ky.), 237.

Question for jury.

Chesapeake & O. Ry. Co. v. Howard *et al.* (U. S.), 660.

Railroad company piling cinders on public highway near crossing is guilty of.

Illinois Cent. R. Co. v. Griffin (Ill.), 767.

Running freight train past station at high rate of speed while passengers are alighting from another train.

Chicago & A. R. Co. v. Kelly (Ill.), 52.

Sufficiency of evidence.

Burns v. Chicago, M. & St. P. Ry. Co. (Wis.), 290.

Foreman v. Pennsylvania R. Co. (Pa.), 246.

Violation of valid ordinance is negligence per se.

Central of Georgia Ry. Co. v. Bond (Ga.), 757.

**NEW TRIAL.**

Central of Georgia Ry. Co. v. Bond (Ga.), 757.

**NONSUIT.**

Rutherford *v.* Southern Ry. Co.  
(S. Car.), 520.

**NOTICE.**

Notice to carrier of contents of  
sample trunk.

Trimble *v.* New York Cent. &  
H. R. R. Co. (N. Y.), 176.

Notice to servant of master's  
rules.

Louisville & N. R. Co. *v.* Bow-  
cock (Ky.), 421.

Stipulation exempting carrier  
from liability for loss where  
shipper fails to give notice of  
loss is valid.

St. Louis & S. F. R. Co. *v.*  
Hurst (Ark.), 324.

Time-tables as notice to shipper  
of delays in transportation.

Burns *v.* Chicago, M. & St. P.  
Ry. Co. (Wis.), 290.

**OPINION EVIDENCE.**

*See Evidence.*

**ORDINANCES.**

Violation of, by railroad company  
is negligence per se.

Central of Georgia Ry. Co. *v.*  
Bond (Ga.), 757.

**PAROL TESTIMONY.**

*See Evidence.*

**PARTIES.**

*See Actions.*

**PLEADING.**

*See Negligence.*

Error superinduced by adversary.  
Missouri, K. & T. Ry. Co. *v.*  
Truskett (Ind. Terr.), 273.

Negligence.

Sims *v.* Western & A. R. Co.  
(Ga.), 756.

**PRIORITY.**

*See Mortgages.*

**PROXIMATE CAUSE.**

Injury to passenger by ejection.  
St. Louis & S. F. R. Co. *v.*  
Kilpatrick (Ark.), 212.

**PROXIMATE CAUSE—Cont'd.**

Injury to servant by falling of  
coal from tender.

Weisel *v.* Eastern Ry. Co. of  
Minn. (Minn.), 446.

Negligent delay of carrier not  
proximate cause of injury to  
goods damaged by fire.

Yazoo & M. V. R. Co. *v.* Mill-  
saps *et al.* (Miss.), 269.

Stock injured by train running  
at unlawful rate of speed.

Central of Georgia Ry. Co. *v.*  
Neidlinger (Ga.), 758.

**PUNITIVE DAMAGES.**

*See Damages.*

**RAILROAD COMMISSIONS.**

Constitutionality of statute au-  
thorizing establishment of  
joint rates.

State *ex rel.* & Railroad Ware-  
house Commission *v.* Minne-  
apolis & St. L. R. Co. *et al.*  
(Minn.), 630.

Determination of cost of repro-  
duction of road.

State *ex rel.* & Railroad Ware-  
house Commission *v.* Minne-  
apolis & St. L. R. Co. *et al.*  
(Minn.), 630.

Effect of order fixing rates.

State *ex rel.* & Railroad Ware-  
house Commission *v.* Minne-  
apolis & St. L. R. Co. *et al.*  
(Minn.), 630.

Presumption as to reasonable-  
ness of rates established by.

State *ex rel.* & Railroad Ware-  
house Commission *v.* Minne-  
apolis & St. L. R. Co. *et al.*  
(Minn.), 630.

Reasonableness of rates fixed by.

State *ex rel.* & Railroad Ware-  
house Commission *v.* Minne-  
apolis & St. L. R. Co. *et al.*  
(Minn.), 630.

**RAILROADS.**

Forfeiture of franchises.

Eel River R. Co. *et al.* *v.* State  
*ex rel.* Kistler, Pros. Atty.,  
(Ind.), 595.

**RAILROADS—Continued.**

Insolvency.

Central Trust Co. of N. Y. v.  
Chattanooga, R. & C. R.  
Co. (C. C. A.), 548.

Interrogatories.

Blair v. Sioux City & P. Ry.  
Co. *et al.* (Iowa), 363.Maintenance of hotel not a  
railroad purpose as a matter of  
law.Abraham v. Oregon & C. R.  
Co. *et al.* (Ore.), 250.Power to mortgage after-ac-  
quired property.Central Trust Co. of N. Y. v.  
Chattanooga, R. & C. R.  
Co. (C. C. A.), 548.Traffic agreement as formation  
of new line.Blair v. Sioux City & P. Ry.  
Co. *et al.* (Iowa), 363.**RATES.***See Carriers of Freight.**Railroad Commissions.***RECEIVERS.**Appointment of, at instance of  
mortgagee.Central Trust Co. of N. Y. v.  
Chattanooga, R. & C. R.  
Co. (C. C. A.), 548.Appointment of, where fran-  
chises have been forfeited.Eel River R. Co. *et al.* v.  
State *ex rel.* Kistler, Pros.  
Atty., (Ind.), 595.Liability of, under statute im-  
posing penalty for cruelty to  
animals in transit.United States v. Harris *et al.*  
(U. S.), 582.**REFRIGERATOR CARS.**Liability of carrier for damage  
to freight caused by failure to  
properly ice refrigerator cars.  
New York, P. & N. R. Co. v.  
Cromwell (Va.), 328.**REHEARING.***See Appeal.***REMARKS OF COUNSEL.***See Trial.***REVENUE.***See Carriers of Freight.***RULES.***See Master and Servant.*Admissibility in evidence of  
post-office department rule in  
action for death of mail clerk.  
Chicago & A. R. Co. v. Kelly  
(Ill.), 52.Mail clerks may rely on rules as  
to movement of trains near  
station.Chicago & A. R. Co. v. Kelly  
(Ill.), 52.**SERVICE OF PROCESS.**Eel River R. Co. *et al.* v. State  
*ex rel.* Kistler, Pros. Atty.,  
(Ind.), 595.**SIGNALS.***See Frightening Horses.***SPECIAL ELECTIONS.***See Taxation.*

Contests.

Vicksburg, S. & P. R. Co. v.  
Scott, Sheriff, *et al.* (La.),  
745.**STATIONS AND DEPOTS.**Grant of exclusive privileges at.  
Hedding v. Gallagher *et al.* (N.  
H.), 192.Running freight train past  
station at a high of speed  
while passengers are returning  
from another train is negli-  
gence.Chicago & A. R. Co. v. Kelly  
(Ill.), 52.**STATUTES.**

Constitutionality.

Chicago, R. I. & P. R. Co.  
v. Zerneck (Neb.), 76.Constitutionality of statute  
authorizing establishment of



**STATUTES—Continued.**

- joint rates by railroad commission.
- State *ex rel.* & Railroad Warehouse Commission *v.* Minneapolis & St. L. R. Co. *et al.* (Minn.), 630.
- Constitutionality of statute requiring railroads to sell mileage books.
- Beardsley *v.* New York L. E. & W. R. Co. *et al.* (N. Y.), 149.
- Construction of.
- Chicago, R. I. & P. R. Co. *v.* Zerneck (Neb.), 76.
- Construction of Lord Campbell's act.
- Chicago R. I. & P. R. I. Co. *v.* Zerneck (Neb.), 76.
- Construction of Nebraska statute giving injured passenger right of action.
- Chicago, R. I. & P. R. Co. *v.* Zerneck (Neb.), 76.
- Construction of statute allowing leases of railroad.
- Eel River R. Co. *et al.* *v.* State *ex rel.* Kistler, Pros. Atty., (Ind.), 595.
- Contests of special elections.
- Vicksburg, S. & P. R. Co. *v.* Scott, Sheriff, *et al.* (La.), 745.
- Damages recoverable under Missouri statute for injuries to live stock in transit.
- Paddock *v.* Missouri Pac. Ry. Co. (Mo.), 310.
- Extra-territorial effect of Missouri statute giving right of action for death by wrongful act.
- Matheson *et al.* *v.* Kansas City, Ft. S. & M. R. Co. (Kan.), 738.
- Iowa statute prohibiting extortion and discrimination in making freight rates is applicable to joint freight rates.
- Blair *v.* Sioux City & P. Ry. Co. *et al.* (Iowa), 363.
- Liability of receivers under penal statute.
- United States *v.* Harris *et al.* (U. S.), 582.

**STATUTES—Continued.**

- Minnesota statute not applicable to case where servant was injured by fall of coal dislodged from tender by fellow servant.
- Weisel *v.* Eastern Ry. Co. of Minnesota (Minn.), 446.
- Missouri statute requiring railroads to pay attorney's fee in addition to damages for injuries to live stock in transit is unconstitutional.
- Paddock *v.* Missouri Pac. Ry. Co. (Mo.), 310.
- Separate coach statute construed.
- Brown *v.* State (Ga.), 247.
- State statutes allowing married women to maintain suit in state court is liable in federal courts.
- Texas & P. Ry. Co. *v.* Humble (C. C. A.), 83.
- Wisconsin statute as to fellow servants construed.
- Medberry *v.* Chicago, M. & St. P. Ry. Co. (Wis.), 494.

**STOCK, INJURY TO.**

*See Fences.*

- Injury to stock at farm crossings.
- Mooers *v.* Northern Pac. Ry. Co. (Minn.), 753.
- Unlawful speed as proximate cause.
- Central of Georgia Ry. Co. *v.* Neidlinger (Ga.), 758.

**SUBROGATION.**

*See Fires.*

**SURPRISE.**

*See Trial.*

**TAXATION.**

- Effect of consolidation of railroads on railroad aid tax.
- Vicksburg, S. & P. R. Co. *v.* Scott, Sheriff, *et al.* (La.), 745.
- Estoppel to deny legality of railroad aid tax.
- Vicksburg, S. & P. R. Co. *v.* Scott, Sheriff, *et al.* (La.), 745.

**TAXATION—Continued.**

Presumption as to.

Union Ref. Transit Co. *v.*  
Lynch, Treasurer, (U. S.),  
588.

Taxation of foreign car used in  
interstate commerce.

Union Ref. Transit Co. *v.*  
Lynch, Treasurer, (U. S.),  
588.

Validity of second election for  
railroad aid tax.

Vicksburg, S. & P. R. Co. *v.*  
Scott, Sheriff, *et al.* (La.),  
745.

**TICKETS AND FARES.**

Authority of conductor to grant  
stop-over privileges.

International & G. N. R. Co. *et*  
*al. v.* Best *et al.* (Tex.), 153.

Constitutionality of statute re-  
quiring railroad companies to  
sell mileage books.

Beardsley *v.* New York L. E.  
& W. R. Co. *et al.* (N. Y.),  
149.

Duty of passenger to pay fare of  
his minor child.

Braun *v.* Northern Pac. Ry.  
Co. (Minn.), 139.

Ejection of passenger holding  
unstamped ticket who entered  
car on conductor's invitation.  
Louisville & N. R. Co. *v.* Blair  
(Tenn.), 159.

**Excursion Tickets.**

Validity of printed conditions.  
Dangerfield *v.* Atchison, T.  
& S. F. Ry. Co. (Kan.),  
650.

Waiver of estoppel.

Dangerfield *v.* Atchison, T.  
& S. F. Ry. Co. (Kan.), 650.

Purchase of ticket not prere-  
quisite to relation of passen-  
ger under Arkansas statute.

St. Louis & S. F. R. Co. *v.*  
Kilpatrick (Ark.), 212.

Validity of condition as to for-  
feiture of mileage books.

Eastman *v.* Maine Cent. R. R.  
Co. (N. H.), 203.

**TRESPASSERS.**

Crossing signals not intended  
for protection of person on  
track elsewhere than at cross-  
ing for his own convenience.

Huff *v.* Chesapeake & Ry. Co.  
(W. Va.), 762.

Duty of railroad to person riding  
on freight train by sufferance  
of trainmen.

Dalton's Adm'r *v.* Louisville &  
N. R. Co. (Ky.), 768.

Ejection.

St. Louis & S. F. R. Co. *v.*  
Kilpatrick (Ark.), 212.

Railroad not liable where there  
is not wanton or gross negli-  
gence for injury to one using  
track as footpath.

Huff *v.* Chesapeake & O. Ry.  
Co. (W. Va.), 762.

**TRIAL.**

Arguments of counsel.

Georgia & A. Ry. Co. *v.* Pound  
(Ga.), 398.

Continuance.

St. Louis & S. F. R. Co. *v.*  
Kilpatrick (Ark.), 212.

Discretion of court as to argu-  
ments and instructions.

St. Louis & S. F. R. Co. *v.* Kil-  
patrick (Ark.), 212.

Issues.

Beardsley *v.* New York, L. E.  
& W. R. Co. *et al.* (N. Y.),  
149.

Judicial discretion as to con-  
tinuance.

Texas & P. Ry. Co. *v.* Humble  
(C. C. A.), 83.

Province of jury.

Baltimore & O. S. W. Ry. Co.  
*v.* Hausman (Ky.), 237.

Remarks of counsel.

Chamberlain *v.* Lake Shore &  
M. S. Ry. Co. (Mich.), 241.

Louisville & N. R. Co. *v.*  
McEwan (Ky.), 208.

Setting aside verdict.

Louisville & N. R. Co. *v.* Blair  
(Tenn.), 159.

Surprise as grant for new trial.

St. Louis & S. F. R. Co. *v.*  
Kilpatrick (Ark.), 212.

**TRIAL—Continued.**

Waiver of submission of question to jury.

Trimble *v.* New York Cent. & H. R. R. Co. (N. Y.), 176.

**ULTRA VIRES.**

Carrier estopped to plead that contract for carriage of freight was ultra vires in an action to recover for its failure to carry out such contract.

Bigelow *v.* Chicago, B. & N. Ry. Co. (Wis.), 341.

Carrier liable for servant's negligence though he was performing an ultra vires agreement of the carrier.

Chesapeake & O. Ry. Co. *v.* Howard *et al.* (U. S.), 660.

**VOLUNTEERS.**

*See Master and Servant.*

**WAIVER.**

*See Jurisdiction.*

*Trial.*

Waiver of rules by master.

Louisville & N. R. Co. *v.* Bowcock (Ky.), 421.

**WAREHOUSEMEN.**

*See Carriers of Freight.*

**WITNESSES.**

*See Trial.*

Attachment.

St. Louis & S. F. R. Co. *v.* Kilpatrick (Ark.), 212.

Evidence as to character of.

Warfield *v.* Louisville & N. R. Co. (Tenn.), 135.

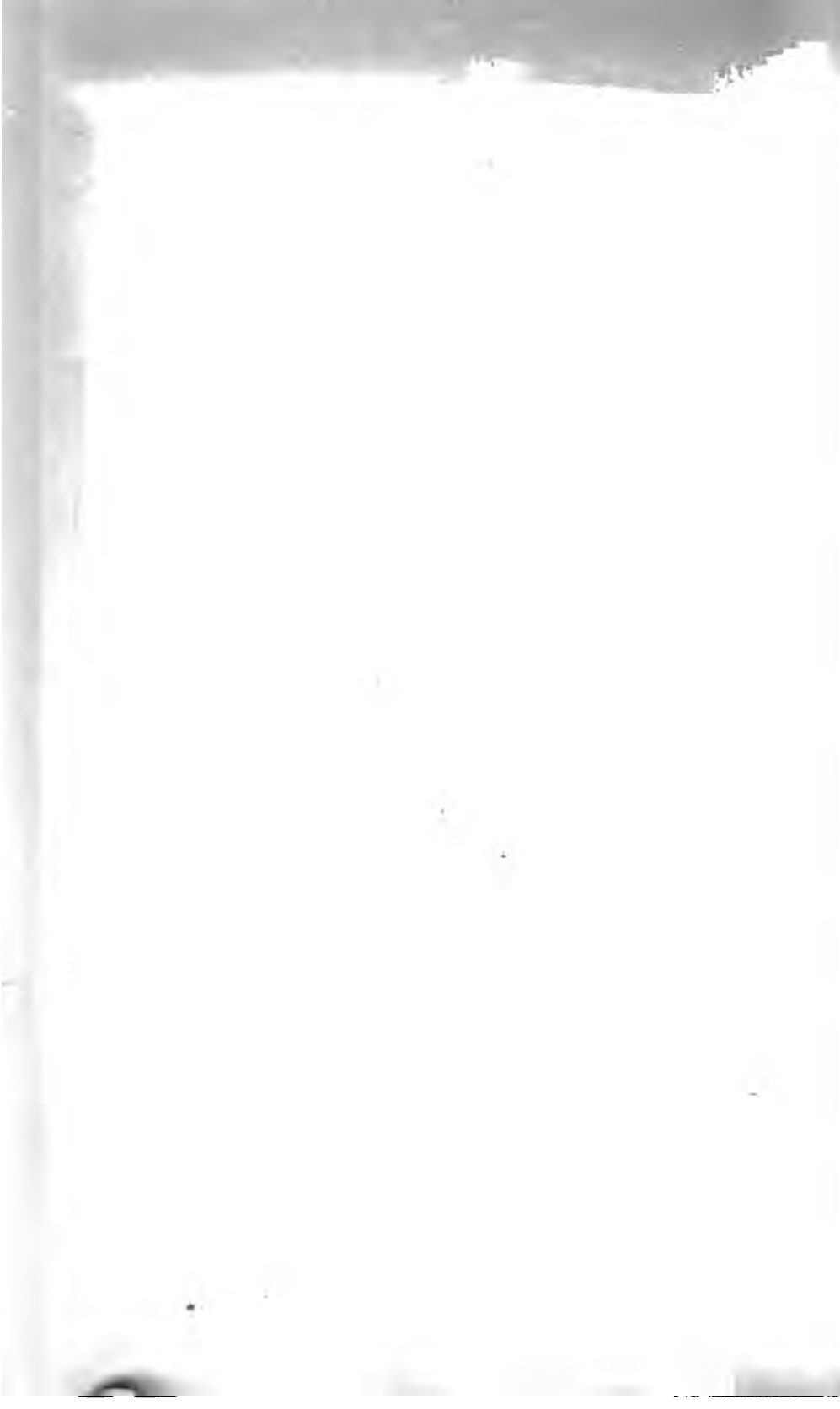
Impeachment.

Haver *v.* Central R. Co. of N. J. (N. J.), 490.









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